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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

SOUTHERN PACIFIC TRANSPORTATION CO.
Appellant,

v.

PUBLIC UTILITIES COMMISSION
OF CALIFORNIA, et al.,
Appellees.

SOUTHERN PACIFIC TRANSPORTATION CO. et al.,
Appellants,

v.

PUBLIC UTILITIES COMMISSION
OF CALIFORNIA, et al.,
Appellees.

On Appeal from the Supreme Court of California

Jurisdictional Statement—State Civil Case

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December 13, 1983

QUESTIONS PRESENTED**I.**

Can a state which failed to seek certification to continue regulating intrastate rail transportation under the Staggers Rail Act of 1980 nevertheless order and require an interstate railroad to provide intrastate rail passenger service?

II.

Can California punish a railroad and two of its managing officers for later suspending that service under a right conferred in the tariff which the railroad was required to file with the Interstate Commerce Commission for the service?

LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES

The parent company of Southern Pacific Transportation Company is Southern Pacific Company. The partially owned subsidiaries and affiliates of Southern Pacific Transportation Company are:

- St. Louis Southwestern Railway Co.
- The Ogden Union Railway & Depot Co.
- Portland Traction Company
- Portland Terminal Railroad Co.
- Sunset Railway Company
- Central California Traction Company
- Trailer Train Company

The wholly and partially-owned subsidiaries and affiliates of St. Louis Southwestern Railway Co. are:

- Alton & Southern Ry. Co.
- Arkansas & Memphis Ry. Bridge & Terminal Co.
- Dallas Terminal Ry. & Union Depot Co.
- St. Louis Southwestern Ry. Co. of Texas
- Southern Illinois & Missouri Bridge Co.
- Southwestern Transportation Co.
- Terminal R.R. Association of St. Louis
- Glascar Inc.
- Main Street Warehouse Company
- The Southwestern Town Lot Corp.
- Kansas City Terminal Railway Co.
- Trailer Train Company

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Jurisdictional Statement—State Civil Case

OPINIONS BELOW

These appeals are from decisions of the California Supreme Court. The first, entered August 18, 1983, in S.F. No. 24525, upheld an assertion of continuing and exclusive California jurisdiction over intrastate rail passenger service, notwithstanding the preemption of state authority in the Staggers Rail Act of 1980. App. at 1a. The second, entered September 14,

1983, in S.F. No. 24573, refused to annul or set aside an order punishing for contempt Southern Pacific Transportation Company and two of its managing officers for suspending intrastate rail passenger service pursuant to a right provided by a tariff on file with the Interstate Commerce Commission.¹ App. at 2a.

The two California Supreme Court decisions are memorialized only by minute orders denying review, without comment or explanation. Such orders are deemed denials on the merits of all claims raised, and an appeal may appropriately be taken, even though the basis for the court's decision is not explained. *Napa Valley Co. v. R.R. Comm.*, 251 U.S. 306, 373 (1920).

The cases arise from the same continuing California controversy, involve identical or closely related issues, and are appealed from the same court. The time for docketing the joint appeal was extended to and including December 13, 1983, by order of Justice William H. Rehnquist, dated October 25, 1983.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C §1257(2).

The California Supreme Court's denials of review, August 18, 1983, in S.F. No. 24525, and September 14, 1983, in S.F. No. 24573, constitute final judgments by the highest court of California that the Staggers Act does not apply to intrastate rail passenger service in California.

¹ The parties to the proceeding in S.F. No. 24525 are Southern Pacific Transportation Company, petitioner, Public Utilities Commission of California and the individual members thereof, respondents, and Department of Transportation, State of California, real party in interest. The parties to the proceeding in S.F. No. 24573 are Southern Pacific Transportation Company, Denman K. McNear, and William S. Weber, petitioners, and Public Utilities Commission of California and the individual members thereof, respondents.

STATUTORY PROVISIONS

The following statutory provisions are set forth in the Appendix at 274a to 286a:

Interstate Commerce Act, as amended by The Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895. 49 U.S.C. §§ 10101a, 10102(21), 10102(25), 10501(c)(1), 11501(b)(1), 11501(b)(2), 11501(b)(3)(A), 11501(b)(4)(A).

Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895, § 3. California Civil Code § 2169.

California Public Utilities Code, §§ 486, 761-763, 2113.

STATEMENT OF THE CASE

A. Commencement of This Litigation: May 1978.

On May 18, 1978, the County of Los Angeles ("County") and Department of Transportation, State of California ("CalTrans"), petitioned the Public Utilities Commission of California ("PUC") for an order directing Southern Pacific Transportation Company ("SP"), an interstate railroad, to start an intrastate commuter passenger train service between Oxnard and Los Angeles, both in California.

The four proposed commuter trains would be operated on SP's Coast main line which is primarily single track, lacks modern remote-controlled electronic, or "centralized traffic control" dispatching machinery, and provides the sole access by rail to major Los Angeles industries. County and Caltrans required that the commuter trains should receive highest priority on this track. They were unwilling to pay for any capital improvements to minimize the displacement of existing rail services.

B. Initial Decision by the PUC: June 1980.

Hearings were held by the PUC, at which SP appeared and vigorously opposed the proposal, but on June 3, 1980, the PUC decided that the requested service should be started. Decision 91847, 3 Cal.PUC 2d. 769, App. at 3a. However, the PUC's implementing order was stayed prior to its effective date; SP's petition for rehearing was granted, and the matter was reopened for receipt of further evidence. Decision 92230 (September 30, 1980) (unreported), App. at 66a. The grant of rehearing meant that the original proceedings were still open, for "rehearing is merely a continuation of the *same* proceeding for the receipt of any additional evidence or argument that may be offered by any party or for further consideration by the Commission." *George F. Pearce*, 63 Cal.PUC 587, 588 (1964) (emphasis in original).

As of the time that the PUC rendered Decision 91847 in June 1980, Sections 762 and 763 of the Public Utilities Code empowered the PUC to order new rail passenger service, and the fact that it would be unprofitable did not, standing alone, provide a basis for challenge under the California or United States constitutions. *Southern Pac. Co. v Public Utilities Commission*, 41 C.2d 354, 366, 260 P.2d 70, 78 (1953); *app. diss.*, 346 U.S. 191 (1954).

C. Passage of the Staggers Rail Act: October 1980.

While the proceedings were still open before The PUC, Congress, responding to mounting concerns of over-regulation of the railroad industry at both state and national levels, made sweeping changes in the Interstate Commerce Act. The Staggers Rail Act of 1980 ("Staggers"), PL 96-448, 94 Stat. 1895, enacted October 14, 1980, with an effective date of October 1, 1980, required states to abandon local concepts of regulation and to become administrators of federal policy in regulating intrastate services. States that were unwilling to assume this role had the choice of deregulating intrastate rail services, or of turning over the regulatory reins to the Interstate Commerce Commission ("ICC").

1. *The Purpose of the Staggers Act.* Staggers was designed to free the railroads from the shackles of over-regulation and to allow them to manage their properties as would a conventional business, in order that the railroad industry could achieve adequate revenues for the services they performed and thereby improve the financial stability of the national rail system in the private sector.

Its goals are stated to be: "The purpose of this Act is to provide for the restoration, maintenance and improvement of the physical facilities and financial stability of the rail system of the United States. . . ." Staggar Rail Act of 1980, PL 96-448, 94 Stat. 1895, § 3.

Implementing these goals was a revised rail transportation policy which provided:

"In regulating the railroad industry, it is the policy of the United States Government—

"(1) To allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. § 10101a.

Extensive debate over the balancing of railroad versus customer needs resulted in the decision to deregulate railroad business under a specific statutory test. Regulatory intervention would be permitted *only* where there was a lack of effective competition—a condition which the Act referred to as "market dominance" by the railroads. Even then, the power to reduce rates was circumscribed by recognition of railroad revenue needs.

2. *The Preemption of the Staggers Act Over Intrastate Rail Transportation.* The role of the states in regulating intrastate transportation was one of great concern to Congress. On the one hand was Congress' traditional reluctance to interfere with the states in their regulation of intrastate commerce, and, on the other hand, there was recognition that the freedoms which Congress sought to confer upon the railroad industry could be frustrated if states compelled the railroads to devote their plants to profitless state transportation services.

This issue was resolved in Section 214 of the Staggers Act,* which amended the Interstate Commerce Act by wholly recasting prior state-federal relationships. Section 214 permitted states to retain a role in the regulation of intrastate rail commerce *only* if they did so as administrators of federal policy. Specifically, it provided that states "may only exercise jurisdiction over intrastate transportation . . . if such state authority exercises such jurisdiction *exclusively in accordance with the provisions of [the Interstate Commerce Act]*." (emphasis added). 49 U.S.C. §11501(b)(1). States desiring to continue to exercise jurisdiction were required to apply to the ICC for certification of their standards and procedures. 49 U.S.C. §11501(b)(2). Any state authority which was denied certification, or which did not seek certification "*may not exercise any jurisdiction over intrastate rates, classifications, rules and practices until it receives certification.*" (emphasis added). 49 U.S.C. §11501(b)(4)(A).

The Conference Report explained the purpose of these provisions:

"The conferees' intent is to ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation of rates, practices, etc., which are not in accordance with these goals. *Accordingly, the Act preempts state authority over rail rates, classifications, rules and practices.* States may only regulate in these areas if they are certified under the procedures of this Section.

The remedies available against rail carriers with respect to rail rates, classifications, rules and practices are exclusively those provided by the Interstate Commerce Act, as amended, and any other federal statutes which are not inconsistent with the Interstate Commerce Act. No state law or federal or state common law remedies are available." House Conference Report No. 96-1430, 4 U.S. Code Cong. & Ad. News 4110 (96th Cong., 2d Sess. 1980), p. 106. (emphasis added).

* Section 214 has been codified in relevant part in 49 USC 10501 and 49 USC 11501.

3. *The Staggers Act State Certification Procedure.* Preemption of state authority did not take effect immediately upon passage of the Staggers Act. A grace period was provided in which state standards and procedures were deemed to be certified for 120 days following the effective date of the Act, during which time the states were to submit their procedures for certification. The ICC had a further 90 days to pass upon each state's request. 49 U.S.C. §11501(b)(3)(A). Thus state authority over state rates and practices did not terminate on October 1, 1980 (the effective date of Staggers), but continued until January 29, 1981.

On November 3, 1980 the ICC instituted a proceeding in *Ex Parte 388, State Intrastate Rail Rate Authority—P.L. 96-448* ("Ex Parte 388"), to implement the federal certification provisions of Section 214. Its notice stated:

"The new law requires that, on or before January 29, 1981, each State authority wishing to exercise jurisdiction over intrastate rail rates, classifications, rules, and practices shall submit to the ICC for approval standards and procedures (including timing requirements) consistent with this legislation. . . ." 45 Fed.Reg. 74571 (Nov. 10, 1980), App. at 178a.

The PUC had not sought certification when the 120-day grace period expired. Thus, on April 22, 1981, when the ICC served another decision, provisionally certifying 40 states to continue regulating intrastate railroad transportation, California was not among them. *Ex Parte 388*, 364 ICC 881, 46 Fed.Reg. 23335 (April 24, 1981), App. at 180a.

"The . . . States [including California] that did not seek certification have lost all jurisdiction to regulate intrastate rail transportation." *Id.* at 885.

This decision confirmed that California's failure to file by the statutory deadline deprived it of "*all jurisdiction*" over intrastate rail transportation. *Ibid.* (emphasis added).

States that had failed to seek certification could either take no further action, in which case intrastate rail transportation would be unregulated, or they could ask the ICC to assume jurisdiction and directly apply the provisions of the Interstate Commerce Act within California to all rail transportation. California chose the latter course. Thus, on May 11, 1982, the ICC took jurisdiction over California intrastate transportation. Its order stated:

"Six States [including California] asked us to assume jurisdiction Consequently, the Commission shall assume jurisdiction over intrastate rail transportation in those States upon publication of this notice in the Federal Register. Rail carriers in these States shall comply with [ICC] regulations such as the filing of intrastate tariffs with us." *Ex Parte* 388, 365 ICC 700, 701, 47 Fed.Reg. 20220 (May 11, 1982), App. at 188a.

D. Further PUC Hearings: October 1980—May 1981.

In October and November 1980, the PUC held further hearings in the reopened commuter rail service case. The hearings took place during the statutory grace period. Up to this point no order had actually required SP to institute the service. At the hearings, County and Caltrans continued to press for an order compelling SP to devote a critical portion of its rail plant to profitless local services, notwithstanding the fact that such an order would directly conflict with the federal standards and procedures that were binding on states under Stagers. Immediately following the conclusion of the hearings, County reversed its position, found that the service request would not provide cost effective transportation, and withdrew. Caltrans persisted and offered to pay SP the deficits.

On April 7, 1981, two months after the statutory grace period had expired for filing for certification with the ICC, the PUC directed SP and Caltrans to negotiate and submit an agreement covering facilities, services and subsidy and also reinstated its order in Decision 91847 to construct commuter stations and to publish a tariff covering the requested commuter service. Decision 92862 (unreported), App. at 73a; Decision 92863, 5 Cal.PUC.2d 773, App. at 82a. On May 7, 1981, SP

filed a petition for rehearing and immediate stay pointing to the passage of the Staggers Act and California's loss of jurisdiction as a result of its failure to file for certification.* On May 22, 1981, the PUC stayed the provisions directed at SP, "pending further review of this matter." Decision 93118 (unreported), App. at 100a. The only requirement not stayed was that SP and Caltrans should proceed with their negotiations.

Putting aside the Staggers Act preemption, the foregoing PUC decisions contained errors in the critical findings of public convenience and necessity required by state law which SP believed warranted correction. In a further effort to resolve the matter under state law, SP filed on July 16, 1981 a petition for writ of review with the California Supreme Court, S.F. No. 24316, *Southern Pacific Transportation Company v. Public Utilities Commission*, raising the lack of basis for public convenience and necessity findings because of County's repudiation of the service proposal. SP's petition informed the California Supreme Court of SP's federal preemption claims based on Staggers but reserved the federal question for decision by the federal courts. SP's petition was denied by minute order dated December 23, 1981. The PUC continued its stay of operative provisions in the challenged orders.

E. The PUC's Unsuccessful Attempt to Challenge the Constitutionality of Staggers: December 1980—November 1982.

The reason the PUC had stayed its orders and did not seek to exercise the authority which it claimed to possess, other than to ask SP and Caltrans to keep negotiating, was that the PUC and SP were then litigating the Staggers Act preemption issue in federal court in Texas.

On December 12, 1980, the State of Texas had filed suit challenging specifically the constitutionality of Section 214; that is, the preemption by the ICC of state authority over intrastate rail transportation. *Texas v. United States*, No. A 80 CA 487 (W.D. Texas). On December 23, 1980, the PUC intervened in

* Rehearing was denied on June 16, 1981. Decision 93211 (unreported).

the Texas litigation. On January 6, 1981, the PUC advised SP by letter that "the [PUC] is challenging the Staggers Act as unconstitutional and . . . the [PUC] believes that California law is still valid and should be complied with." App. at 287a.

SP thereupon intervened in the Texas litigation in support of the constitutionality of the Staggers Act and filed, jointly with two other railroads, a motion for summary judgment. On April 21, 1981, the PUC filed, jointly with the states of Texas, New York, Tennessee, and Kansas, a cross-motion for summary judgment. The PUC motion challenged the constitutionality of Section 214 of Staggers; however, nothing in its motion suggested that the reach of the Staggers Act differed as between passenger and freight services, or requested a ruling that, even if freight services were found to be constitutionally regulated by Staggers, passenger services should be held exempted.

The Texas court ruled on November 3, 1982, that "for the reasons ably presented in the briefs and arguments of Defendants and Defendants' Intervenors, that Defendants and Defendants' Intervenors are entitled to judgment in their favor as a matter of law . . . and that those above-cited motions filed by Plaintiffs' Intervenors should be denied." App. at 247a.

The PUC has not appealed from that decision. (Texas and several other parties did appeal: *Texas v. U.S.A.*, No. 82-1693 (5th Cir., argued September 27, 1983)).

F. The Basis for SP's First Appeal to This Court: The "Service Order" Case.

While the Texas motions were pending, SP continued its discussions with Caltrans, advising Caltrans that it would be willing to operate a demonstration commuter train service, provided SP was fully compensated as directed by Congress in Staggers. Caltrans could either agree to pay revenue-adequate compensation, in which case SP's opposition would be withdrawn, or it could conclude that the price was beyond its budget and withdraw its request as County had done. In either event,

the controversy would be moot. It thus appeared probable to SP that the matter would be resolved at the state level, without the necessity of any further constitutional challenge.

Caltrans ultimately concluded that it would not pay the revenue-adequate compensation requested by SP, and instead requested the PUC to restore a timetable directing SP to implement the requested commuter service. On June 2, 1982, the PUC dissolved its stay and ordered SP to commence constructing stations and to file its passenger train tariff. Decision 82-06-045 (unreported), App. at 115a. In October 1982, the PUC modified its orders and directed the start-up of service on a particular schedule.² Decision 82-10-031, (October 6, 1982) (unreported), App. at 125a and Decision 82-10-041, (October 18, 1982) (unreported), App. at 131a. The summary judgment motions were still pending in Texas.

SP petitioned for rehearing of the service order, arguing that complete jurisdiction over intrastate transportation had vested in the ICC, effective May 11, 1982, as a result of the ICC's decision in *Ex Parte 388*, described above. SP's petition asserted that assumption by the ICC of jurisdiction expressly terminated California's power to require carriers to provide transportation—freight or passenger.

Rehearing was denied by the PUC. A petition for writ of review, S.F. No. 24525, *Southern Pacific Transportation Company v. Public Utilities Commission*, was filed with the Supreme Court of California. The California Supreme Court's denial of that petition on August 18, 1983, affirmed the PUC's position that Staggers does not encompass intrastate passenger service, and it is appealed here. Thus, the first question squarely presented to this Court is whether California erred in holding that the PUC continued to retain jurisdiction to order intrastate rail passenger transportation notwithstanding the complete loss of "all jurisdiction" by California on January 29, 1981 "to

² The authority sources relied on by the PUC include California Civil Code Section 2169 (obligation of common carriers) and Public Utilities Code sections 761, 762, and 763 (authority to order new services). Decision 91847, *supra*, at 731. Though not specifically cited, Section 486 of the Public Utilities Code is that requiring the filing of tariffs for intrastate services with the PUC.

regulate intrastate rail transportation" (*Ex Parte No. 388, supra*, 364 ICC at 885) and the ICC's assumption of exclusive jurisdiction over California intrastate rail transportation on May 11, 1982 (*Ex Parte 388, supra*, 365 ICC at 701).

G. SP's Federal Suit For Injunctive Relief: June 1982.

Meanwhile, in response to the PUC's June 2, 1982 order dissolving the stay and ordering construction of stations and filing of tariffs, SP had filed an action June 15, 1982, in the United States District Court for the Northern District of California seeking to enjoin the PUC from attempting to order the proposed service on the grounds that Stagers had deprived California of any authority to order the service. *Southern Pacific Transportation Company v. Public Utilities Commission*, No. C-82-3074 MHP. However, that action was dismissed without reaching the fundamental question of Stagers' preemption. App. at 250a. The court concluded instead that SP's claim of federal preemption had been before the California Supreme Court in S.F. No. 24316 and the California Supreme Court's minute order of December 23, 1981 denying review served as a final adjudication on the merits for *res judicata* purposes. The court then held that SP's failure to seek review in this Court at that time thereafter barred SP from raising the issue anew in another forum.

SP appealed the decision to the United States Court of Appeals for the Ninth Circuit, which, on September 27, 1983, sustained the district court, again without reaching the merits of the preemption issue. *Southern Pacific Transportation Co. v. Public Utilities Commission*, No. 82-4466, (filed August 19, 1982), App. at 261a. Mandate was entered on October 24, 1983, and certiorari is being sought from this Court. SP's petition challenging the application of *res judicata* will be filed with this Court on or before December 22, 1983.

H. Commencement of the Service and Filing of Tariffs: October 1982—December 1982.

Because it was unsuccessful in its attempt in federal court to stop the PUC's efforts to institute the commuter train service, SP, under protest, complied with the PUC's order and commenced operating the commuter trains for Caltrans on October 18, 1982.

At this juncture, SP was faced with a dilemma. The PUC had directed SP to file tariffs for the commute service with the PUC. The ICC, on the other hand, as of May 11, 1982, when it assumed "all jurisdiction" over intrastate rail transportation in California, had directed SP to file all intrastate tariffs with the ICC. *Ex Parte* 388, *supra*, 365 ICC 701. SP concluded that regardless of the origin of the service, and regardless of whether the PUC directives were valid or invalid, so long as the trains were running it was a violation of federal law to do so without a tariff on file at the ICC covering the service that SP was providing.

SP therefore compiled a tariff which was consistent with Staggers in providing revenue-adequate compensation for the commuter services that were being performed for Caltrans. Because SP designated Caltrans, rather than individual riders, as its customer, SP had to obtain special permission from the ICC to accept the tariff for filing. This was granted by the ICC Special Permission Board, over the protests of Caltrans, on November 10, 1982. Special Tariff Authority No. 83-1876, App. at 190a. Next, Caltrans requested the ICC's Chief of the Section of Tariffs to reject the tariff. This request was denied. Caltrans then asked to have the tariff suspended and investigated by the ICC. The ICC denied that request. Caltrans took an immediate appeal to Division 1 of the ICC, but was unsuccessful and the tariff thereupon became effective December 2, 1982. Suspension Case No. 70965, *California Special Train Service, Southern Pacific*, Notice (December 1, 1982) (unprinted), App. at 192a. Caltrans thereafter filed a petition for reconsideration and a recount of the vote of Division 1, arguing that the tariff should have been deemed suspended and investigated by the ICC. Division 1, in a unanimous opinion, denied the Caltrans petition on January 17, 1983. Suspension Case No. 70965, *California Special Train Service, Southern Pacific* (unprinted), App. at 194a. The tariff is in effect and on file today at the ICC.

On October 19, 1983, Caltrans filed a formal complaint at the ICC (Docket No. 39595) seeking a finding that the tariff is unlawful. The matter is pending.

I. The Basis for SP's Second Appeal to This Court: The "Contempt" Case.

The second appeal in this case arises from SP's implementation of its ICC tariff. To ensure that the service would not be operated indefinitely without payment, SP had included in its ICC tariff a provision that charges due under it be periodically paid, or service would be temporarily suspended until Caltrans paid past due bills. Caltrans not only refused to recognize the tariff; it refused to honor SP's bills. As a result, on February 7, 1983, SP officers temporarily suspended the commuter service for non-payment, as permitted by the ICC tariff.

On the same day, Ventura County, the cities of Simi Valley and Oxnard, and a number of individual commuters obtained a temporary restraining order from the U.S. District Court for the Northern District of California requiring restoration of the service. *County of Ventura v. Southern Pacific Transportation Company*, No. C-83-0581-TEH. Two weeks later the temporary restraining order was dissolved, and the complaint was dismissed for lack of jurisdiction.

The PUC undertook to punish SP and the corporate officers who authorized the service suspension, Denman K. McNear and William S. Weber, and on February 17, 1983, the PUC held SP, McNear and Weber in contempt and fined them \$16,000. Decision 83-02-079, (unreported) App. at 146a. The PUC subsequently reduced the fine to \$1,000, but denied a petition by SP, McNear and Weber for rehearing. Again raising Staggers Act preemption issues, SP appealed to the California Supreme Court, on June 2, 1983. S.F. No. 24573, *Southern Pacific Transportation Company, et al. v. PUC*. The denial of that petition, by minute order entered September 14, 1983, is the second decision of the California Supreme Court which is the subject of this joint appeal. The denial again places California in the position of claiming that, despite the

clear language of the Interstate Commerce Act, as amended by Staggers and as implemented by the ICC, California can continue to regulate rail passenger service and to punish those who seek to exercise conflicting rights recognized by the ICC.

J. Suspension of the Commute Service: March 1983.

Well before the California Supreme Court entered its decision in the contempt proceeding, Caltrans concluded that the uncertainty surrounding its liability for charges for the Caltrain service warranted temporary suspension. Accordingly, on March 11, 1983, the PUC issued its own order authorizing temporary suspension, but expressly retained jurisdiction to restore the service. Decision 83-03-027, App. at 155a. The PUC reiterated its finding that public convenience and necessity require the trains; it reasserted its claim of jurisdiction over compensation and directed SP to hold the vacant commuter stations in readiness for resumed operations on further order of the PUC.

The PUC decision of March 11, 1983, and SP's ICC tariff permit only temporary suspension. Seeking a permanent termination of any obligation to operate the intrastate passenger trains, SP filed a petition with the ICC on February 9, 1983, in Finance Docket 30123, *Southern Pacific Transportation Company Discontinuance of Passenger Train Service in Ventura and Los Angeles Counties, CA* ("Docket 30123"). By a decision served December 2, 1983 in Docket 30123, App. at 197a, Paul Clerman, Administrative Law Judge for the ICC, granted SP's petition for authority to permanently discontinue the passenger train service between Oxnard and Los Angeles.

In his decision, Judge Clerman specifically held that the ICC has jurisdiction over the discontinuance proceeding under 49 U.S.C. § 11501(c) (Section 214 of the Staggers Act). After carefully reviewing the applicable statutes and their legislative history, he concluded that Staggers does encompass rail passenger service, that the ICC in fact has taken jurisdiction over this matter, and that even the *possibility* that the PUC will require SP to perform the commuter service in the future creates an unreasonable burden on SP and, thus, on interstate commerce. Docket 30123, Slip Opinion, pp. 7-9, 23-24, App. at 210a-211a.

As a consequence of the decisions of the California Supreme Court upholding the PUC's conduct and orders in defiance of the Staggers Act, the Staggers Act preemption has been rendered null and void in California. Whereas elsewhere in this country, non-certified states are precluded by Staggers from attempting to exert jurisdiction over intrastate rail transportation, California continues to claim jurisdiction. It apparently considers itself unaffected by either the Texas District Court's judgment of November 2, 1982, denying the PUC's challenges to Section 214 of the Staggers Act, or the decisions of the ICC depriving California of jurisdiction and assuming jurisdiction itself. These appeals seek to terminate California's claim of continuing jurisdiction over intrastate rail passenger service and to vacate the convictions of SP, McNear and Weber.

SUBSTANTIALITY OF THE QUESTIONS PRESENTED

I.

THE DIRECT RESULT OF THE DECISIONS BELOW IS TO OBSTRUCT AND FRUSTRATE THE STAGGERS ACT OF 1980

If California—or any other state—can successfully create an enclave in which States are protected from federal preemption, the national purposes and objectives of the Staggers Rail Act of 1980 will effectively be frustrated.

A. The PUC Has Affirmatively Relinquished Its Jurisdiction Over Intrastate Rail Transportation to the ICC.

The Staggers Act of 1980 gave an ailing railroad industry a charter for survival based upon the freedom to determine the business uses to be made of rail properties and the prices to be charged for rail services. In Staggers, Congress found that in the past railroads had been over-burdened with costly and inefficient regulation. Congress adopted a new rail transportation policy which allows railroads, to the maximum extent possible, to establish their own rates based on competition and the demand for services. 49 U.S.C. 10101a.

Under Staggers, the only authority left to state agencies to regulate intrastate rail transportation is to be exercised "exclusively in accordance with the provisions" of the Interstate Commerce Act, as amended by Staggers. 49 U.S.C. §11501(b)(1). Even then, Staggers *only* allows a State to exercise jurisdiction over intrastate rail rates, classifications, rules and practices if the ICC determines that its "standards and procedures are in accordance with the standards and procedures applicable to regulation of rail carriers by the [Interstate Commerce] Commission." 49 U.S.C. §11501(b)(3)(A).

California failed to seek certification of *any* of its standards and procedures and thereupon lost jurisdiction over "intrastate rates, classifications, rules, and practices." 49 U.S.C. §11501(b)(4)(A). Indeed, California *requested* that the ICC assume jurisdiction over California intrastate rail transportation, and the ICC took jurisdiction on May 11, 1982.

B. The ICC's Jurisdiction Includes Rail Passenger Service.

In order to insulate itself from Staggers, the PUC has suggested that its request to the ICC to assume jurisdiction pertained only to freight, and not passenger, matters. There is no basis in the Staggers Act for bifurcating the ICC's jurisdiction. 49 U.S.C. §11501(b)(4)(A).

First, wherever the Staggers Act amendments to the Interstate Commerce Act refer to "rates" this includes, by definition, both freight rates and passenger fares. 49 U.S.C. § 10102(21). Reference to "transportation," by definition, includes locomotives, cars, yards, facilities, instrumentalities, or equipment of any kind related to the movement of passengers or property, as well as services relating to the movement of passengers, and property. 49 U.S.C. § 10102(25). When California lost authority to issue orders requiring reasonable intrastate "transportation" (49 U.S.C. § 10501(c)(1)) that loss included, by the terms of the statute, both passenger and freight transportation.

Second, the ICC treated the California request as encompassing all rail transportation; its May 11, 1982 decision assumes "jurisdiction over intrastate rail transportation." *Ex Parte 388, supra*, 365 ICC at 701. As a result, any residual authority in the PUC to require intrastate service of any kind was extinguished. This is clear from the general jurisdictional delineation established in 49 U.S.C. §10501 reserving to the states police power "to require reasonable intrastate transportation" *unless* the transportation is subject to the jurisdiction of the ICC pursuant to a denial of state certification. 49 U.S.C. §10501(c)(1).³

Finally, had the PUC'S requested division been effective, the result would still have been to *deregulate* California passenger matters and to deprive the PUC of jurisdiction, because California failed to seek certification of any standards and procedures for regulating passenger services. 49 U.S.C. §11501(b)(4)(A).

ICC Administrative Law Judge Clerman summed up the matter succinctly when he said:

"Unless it is presumed that the Congress was exceedingly careless in the drafting of section 214 of Staggers, and that the Commission has been equally careless in the implementation thereof, the conclusion is warranted in light of the foregoing [analysis of relevant statutes] that rail passenger operations are within the purview of the statute [§11501]. . . . In other words, where the Commission in its decisions in *Ex Parte No. 388* has made the finding that a State, such as California, has 'lost all jurisdiction to regulate intrastate rail transportation', that 'transportation' by statutory definition and in the absence

³ Before Staggers, the Interstate Commerce Act had read:

"This subtitle does not affect the power of a State, in exercising its police power, to require reasonable intrastate transportation by carriers providing transportation subject to the jurisdiction of the Commission under this subchapter." 49 U.S.C. §10501(c).

Section 214 of Staggers added:

"[unless] (1) the transportation is deemed to be subject to the jurisdiction of the Commission pursuant to section 11501(b)(4)(B) of this title—" 49 U.S.C. §10501(c)(1).

of affirmative indication to the contrary must be taken to include also rail passenger operations." Docket 30123, Slip Opinion, *supra*, at 9, App. at 210a-211a.

C. The California Supreme Court's Denial of SP's Petition Frustrates Congress' Intent in Enacting Staggers.

The effects of the Staggers preemption were fully briefed before the Supreme Court of California in S.F. No. 24525, which challenged the PUC's order to institute the commute service and which is the first appeal brought here. The California Supreme Court's denial of review constitutes a final judgment on the merits, including federal constitutional issues. *Napa Valley Co. v. Railroad Commission*, 251 U.S. 366, 372 (1920); followed in *Pacific Tel. & Tel. Co. v. PUC*, 600 F.2d 1309, 1315-1316 (9th Cir.), *cert. denied*, 444 U.S. 920 (1979).

California has thus ruled that the Staggers Rail Act of 1980 will not apply to intrastate rail passenger service operated in California. That the basis for the California Supreme Court's ruling cannot be determined is immaterial; as noted in *Napa Valley*, though it appeared "the court instead of hearing refused to hear, instead of adjudicating refused to adjudicate" *Napa Valley Co. v. Railroad Commission*, *supra*, at 371, the lack of explanation on issues fully briefed and essential to decision does not "detract from its efficacy as a judgment upon the questions presented. . . . *Id.* at 373.

The California Supreme Court's decision upholding the precedence of California regulatory statutes over the Staggers Rail Act of 1980, and upholding California jurisdiction even after it had passed to the ICC, is untenable. Congress' power under the Commerce Clause to preempt state regulation of intrastate rail transportation cannot seriously be questioned. As this Court stated in *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264, 276 (1981):

"The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that a regulated activity

affects interstate commerce, if there is any rational basis for such a finding."

The Congressional findings here are specific:

"The conferees' intent is to ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation of rates, practices, etc., which are not in accordance with these goals. Accordingly, the Act preempts state authority over rail rates, classifications, rules, and practice. . . .

"The remedies available against rail carriers with respect to rail rates, classifications, rules and practices are exclusively those provided by the Interstate Commerce Act, as amended, and any other federal statutes which are not inconsistent with the Interstate Commerce Act. No state law or federal or state common law remedies are available." *House Conference Report No. 96-1430, supra*, page 106.

It is apparent that the purposes and objectives of the Staggers Act will be frustrated if individual States demand, as California did here, that carriers devote critical portions of their plant capacity to profitless local passenger services demanded by parochial special interests. The fact that the legislative history does not address passenger deficit problems does not mean that the specific language of the statute, written to cover both freight and passenger transportation, can therefore be ignored.

When the words of the statute are clear, resort may not be had to the legislative history to create ambiguity. In *Wisconsin R.R. Com. v. C., B.&Q. R.R. Co.*, 257 U.S. 563, 589 (1922), it was argued that the legislative history of the Transportation Act of 1920 disclosed no intention to authorize the ICC to order general increases in intrastate passenger fares—although the Act as passed seemed broad enough to encompass that result. The Court observed:

"But when taking the act as a whole, the effect of the language used is clear to the court, extraneous aid like this can not control the interpretation. [cite]. Such aids are only admissible to solve doubt and not to create it."

D. A Reversal by This Court is Not Barred by Res Judicata.

The PUC may attempt to cloud the real issue in this first appeal by claiming that the California Supreme Court's denial of review in December 1981 of the PUC's early decisions in this proceeding was a final denial of SP's Staggers Act preemption claims, so that failure to seek review in this Court at that time foreclosed further consideration of the subject in another forum, or at another time.

The response to these contentions will be covered in full measure in the petition to be filed by SP December 22, 1983, seeking a writ of certiorari from the Court of Appeals' decision in *Southern Pacific Transportation Co. v. Public Utilities Commission*, *supra*, that *res judicata* precluded consideration of SP's preemption claims. However, in brief, *res judicata* could not be properly applied for the following reasons:

First, the early PUC decisions which the California Supreme Court declined to review in December 1981 did not order train service but only required that SP negotiate with Caltrans, with further orders contemplated should SP and Caltrans fail to agree upon the terms and conditions under which SP would operate commute trains for Caltrans. Constitutional issues arising from state administrative proceedings are not ripe for review by this Court so long as the case is still open before the agency and may be resolved on non-federal grounds. *Dump Truck Owners Assn. v. Public Util. Comm'n*, 434 U.S. 9 (1977).

Second, while even the PUC directive to SP to negotiate with Caltrans was beyond California's jurisdiction,⁴ the intrusion was not one in which "a refusal immediately to review a state-court decision might seriously erode federal policy." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 483 (1975). The *Cox* exception was patently inapplicable here because the PUC at that time had not directed SP to do anything other than negotiate with Caltrans, which can hardly be termed to "seriously erode federal policy."

⁴ Because it directed the negotiation of rates and practices. 49 U.S.C. §11501(b)(4)(A).

Third, the PUC had deferred all of the substantive provisions of its orders concerning construction of stations, filing of tariffs, and operation of trains taken while it challenged the constitutionality of the preemption of state authority in Section 214 of the Staggers Act in another forum—a challenge that would resolve whether the California jurisdictional claims had merit.⁵ No. A-80-CA-487, *Texas v. United States*, *supra*. With the PUC's constitutional challenge thus pending before the federal district court in Texas, this Court could not be expected to review a sub-issue affecting only California and the PUC.

Finally, in petitioning the State Supreme Court for review, SP specifically called the Texas litigation to the court's attention, advised it that Texas, not California, was the forum for resolution of Staggers Act issues, and declined to submit SP's arguments on Staggers to an adverse ruling by California. The issue was therefore not before the California Supreme Court and could not preclude SP's pursuing the matter in federal court. *England v. Medical Examiners*, 375 U.S. 411 (1964).

There was no bar to SP's raising the Staggers Act preemption issue in the two appeals before this Court. Because the California Supreme Court has refused to recognize in its subsequent decisions that Staggers Act preempts, this Court must reverse those decisions.

II.

CALIFORNIA'S AFFIRMANCE OF THE CONTEMPT CONVICTIONS WAS AN IMPERMISSIBLE OBSTRUCTION OF THE STAGGERS RAIL ACT

When the PUC directed that SP file a passenger rail tariff with it, SP complied, under protest. Yet, regardless of the origin of the service, so long as the trains were running, it was a violation of federal law *not* to have a tariff on file with the ICC.

⁵ The PUC was there contesting the loss of jurisdiction generally—freight as well as passenger.

SP therefore constructed a tariff under Staggers Act standards and filed it with the ICC. The ICC allowed the tariff to become effective despite strenuous protests from Caltrans.

Once in effect, that ICC tariff had the force and effect of law (*Armour Packing Co. v. United States*, 209 U.S. 56, 81 (1908)) and only the ICC, as the agency charged with administering the federal policy, can hold any of its specific features unreasonable. *United States v. Western Pac. R. Co.*, 352 U.S. 59, 63-64 (1956). Only the ICC can adjust, vary, modify or strike down any of the tariff terms. *Burlington Northern v. United States*, ___U.S.___, 103 S.Ct. 514, 522, 74 L.Ed 2d 311, 319 (1982).

The ICC tariff contained, as one of its provisions, the right to temporarily suspend service for non-payment of charges named in the tariff. Caltrans specifically objected to this provision during the suspension proceedings, but its objections did not prevail. And, so long as the tariff was in force, SP had the right and the duty to collect its lawfully assessed charges. *Southern Pac. Trans. Co. v. Commercial Metals*, 456 U.S. 336, 344 (1982).

Caltrans' refusal to recognize the ICC tariff, and its refusal to pay any of the charges provided under it, were grounds for suspension of service under the tariff until Caltrans paid. There is no rule in any jurisdiction which permits a patron of a utility or common carrier to decide for itself that it will not pay the tariff charges and still have a right to uninterrupted service.

For suspending service pursuant to the ICC tariff, SP, McNear and Weber were declared in contempt of the PUC under Section 2113 of the Public Utilities Code. The affirmation of their conviction by the California Supreme Court, through its denial of review, is a holding by California that the Public Utilities Code takes precedence over the Staggers Rail Act of 1980, a conclusion which is in direct conflict with the language of the Staggers Act, and the actions taken by the ICC to implement it within California. The PUC order fining SP

and its executives for exercising rights arising out of the Staggers Act stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and must be annulled. *Jones v. Rath Packing Co.*, 430 U.S. 519, 526, 540-541 (1976) quoting from *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

The PUC may again attempt to stop this Court from reaching the real issue by raising the claim of *res judicata* based on the December 1981 denial by the California Supreme Court of SP's petition on the early decisions. *Res judicata* is inapplicable for all of the reasons previously given, but—even more importantly—because the facts presented in the contempt proceedings were new and thus were not and could not have been raised in 1981.

The first new fact was the ICC's assumption of jurisdiction over California intrastate rail transportation on May 11, 1982. Prior to that date, the ICC had no jurisdiction over California intrastate rail transportation matters. On that date, the ICC assumed complete jurisdiction over all California intrastate rail transportation matters and directed the California rail carriers to file their intrastate rail tariffs with the ICC.

Second, pursuant to its order of May 11, 1982, the ICC accepted SP's tariff without suspension or investigation. Neither of these events had occurred when the California Supreme Court denied SP's petition in 1981.

There is no dispute that SP acted strictly in accordance with the provisions of the ICC tariff in temporarily suspending service for non-payment. The California Supreme Court's approval of the PUC order convicting SP and two of its officers for invoking the provisions of the federal tariff approved an impermissible obstruction of the purposes and objectives of the Staggers Rail Act of 1980, and cannot stand.

CONCLUSION

The minute orders of the California Supreme Court in S.F. No. 24525 dated August 18, 1983, and in S.F. No. 24573 dated September 14, 1983, should be reversed and set aside, with instructions to vacate the contempt convictions of SP, Denman K. McNear, William S. Weber affirmed in No. 24573, and to annul the orders of the Public Utilities Commission affirmed in No. 24525, purporting to exercise jurisdiction over California intrastate rail transportation after May 10, 1982.

Dated at San Francisco, California this 12th day of December, 1983.

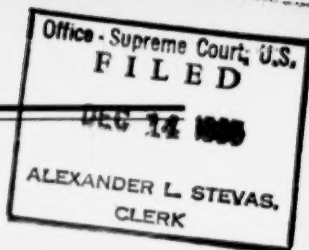
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83-985



No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

SOUTHERN PACIFIC TRANSPORTATION CO.
Appellant,

v.

PUBLIC UTILITIES COMMISSION
OF CALIFORNIA, et al.,
Appellees.

SOUTHERN PACIFIC TRANSPORTATION CO. et al.,
Appellants,

v.

PUBLIC UTILITIES COMMISSION
OF CALIFORNIA, et al.,
Appellees.

On Appeal from the Supreme Court of California

Appendix to Jurisdictional Statement—State Civil Case

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SUPREME COURT
FILED
AUGUST 18, 1983
LAURENCE P. GILL,
Clerk

ORDER DENYING WRIT OF REVIEW

S.F. No. 24525

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

IN BANK

SOUTHERN PACIFIC TRANSPORTATION
COMPANY, etc.,

Petitioner

v.

PUBLIC UTILITIES COMMISSION,
etc., et al.,

Respondents;

DEPARTMENT OF TRANSPORTATION, etc.,
Real Party In Interest

Petition for writ of review DENIED.

BIRD

Chief Justice

SUPREME COURT
FILED
SEPTEMBER 14, 1983
LAURENCE P. GILL
CLERK

ORDER DENYING WRIT OF REVIEW

SF No. 24573

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

IN BANK

**SOUTHERN PACIFIC TRANSPORTATION
COMPANY, et al.**

v.

PUBLIC UTILITIES COMMISSION

Petition for writ of review DENIED.

BIRD
Chief Justice

DECISION NO. 91847, CASE NO. 10675
(June 3, 1980)

Complaint of County of Los Angeles v. SoPac Transp. Co. to operate passenger train service between Los Angeles and Oxnard granted.

- [1] **ORDERS OF COMMISSION—CONCLUSIVE NESS AND FINALITY.** We determined that SP's argument had no merit and denied its motion on February 27, 1979 in D 90018. SP did not pursue its right to seek judicial review of this determination and it thereby became final by operation of law. (PU Code Secs. 1709 and 1736.)
- [2] **DEDICATION.** From the onset of State regulation over railroads as public utilities, the scope of their dedication has been primarily defined in terms of the rights-of-way over which they provide railroad service with no distinction made between passenger and freight service.
- [3] **RAILROADS.** We know of no cases restricting the application of this section [763] to service presently being provided. The Commission may also, after hearing, order additions, extensions to, or changes in existing equipment of facilities, "to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities. . . ." (Section 762.)
- [4] **CERTIFICATES—CONVENIENCE AND NECESSITY—IN GENERAL.** The concept of public convenience and necessity is necessarily fluid. The factors which determine the level of service and equipment adequate to serve the public will necessarily differ as populations grow or diminish and as other forms of transportation become more or less dominant.
- [5] **COMMISSION—JURISDICTIONAL LIMITATIONS—FEDERAL BOARDS.** We acknowledge that where a railroad has contracted with Amtrak for the latter to take over intercity passenger service, the railroad is relieved of its responsibilities under State law as a common carrier of passengers, but in intercity only (45 U.S.C.A. Section 561(a)(1)). This does not affect any responsibilities SP may have to provide commuter service, nor does it affect the Commission's jurisdiction to determine the extent of such responsibility.
- [6] **SERVICE—SERVICE AND FACILITIES REQUIRED.** We wish to stress that it is essential that the Commission staff have full access to public utility property and facilities in order to conduct the examinations and tests pertaining to the powers afforded the Commission and its staff in the Public Utilities Act.
- Owen L. Gallagher and Douglas Ring, Attorneys at Law, for County of Los Angeles; and Robert A. Munroe, O. J. Solander, and Robert B. Patterson, Attorneys at Law, for State of California, Department of Transportation; complainants.*
- John MacDonald Smith and Carol A. Harris, Attorneys at Law, for Southern Pacific Transportation Company, defendant.*
- D. H. Brey and Paul E. Morrison, for Brotherhood of Locomotive Engineers; James P. Jones, for United Transportation Union, California Legislative Board; and Eugene C. Given and Lat J. Celmins, Attorney at Law, for Greyhound Lines, Inc.; intervenors.*
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OPINION

By their complaint filed May 18, 1978, the County of Los Angeles (County) and the State of California Department of Transportation (Caltrans) request an order of the Commission directing Southern Pacific Transportation Company (SP) to operate passenger train service between Los Angeles and Oxnard.

On October 6, 1978 SP filed a motion to dismiss the complaint for lack of jurisdiction. Following oral argument on November 13, 1978 the motion was denied by Decision No. 90018 dated February 27, 1979. By Decision No. 90412 dated June 5, 1979 rehearing on the motion was denied.

Public hearing on the complaint was held before Administrative Law Judge Daly at Simi Valley, Los Angeles, and San Francisco and was submitted on January 22, 1980 upon concurrent briefs, which were filed on March 12, 1980.

Reasons for Filing Complaint

Los Angeles County Board of Supervisors member Baxter Ward and Ms. Adriana Gianturco, Director of Caltrans, testified on behalf of complainants.

Supervisor Ward testified that in June 1974, County allocated \$4,125,000 for developing a pilot commuter rail service in three corridors: (1) San Fernando Valley, (2) San Bernardino, and (3) Santa Ana. He further testified that following a meeting with Amtrak's president, County was advised that Amtrak would provide service only in the Santa Ana corridor and only upon the condition that service was extended to San Diego and County purchased the equipment. County thereupon purchased and refurbished eight passenger cars and The Atchison, Topeka and Santa Fe Railway Company agreed to operate the service for Amtrak with Caltrans as the prime contractor. Following a six-month trial period, Caltrans agreed to undertake full responsibility for financing the service. This freed the eight rail cars, which were replaced by Amtrak fleet coaches.

On March 9, 1978 representatives of the County met with SP and requested that it "haul" the County's railroad cars or initiate the sought train service. SP refused and the instant complaint followed.

Ms. Gianturco testified that approximately 86 percent of all travel is by automobile and less than one percent is by train. According to Ms. Gianturco, the extensive use of the automobile has placed large costs on the general public in terms of environmental deterioration, traffic congestion, energy consumption, and the use of large amounts of land for roads and parking. As a result, Caltrans now has second thoughts

about the desirability of unrestrained auto use, particularly in urban areas. The goal of Caltrans is to develop a balanced transportation system that considers all transportation modes within realistic funding levels. Caltrans contends that there is an existing need for commuter rail service between Oxnard and Los Angeles Union Terminal and that inauguration of such a service would be responsive to the Legislature's support for alternative rail service as expressed in Chapter 1130, Statutes of 1975, as amended by Chapter 1067, Statutes of 1977, wherein it stated:

"It is the policy of the state to encourage rail passenger service as an alternative to the automobile because of such services' high fuel efficiency and in order to relieve heavily traveled highways."

History

On October 29, 1901, the Pacific Electric Railroad System (PE), consisting of eight interurban street railroads, was organized for the purpose of providing local and commuter rail service within the Los Angeles Basin. Mr. Henry E. Huntington, who was the largest single shareholder, was also a vice president of SP. On September 11, 1911 PE became a wholly owned subsidiary of SP and was used as a feeder service to SP's transcontinental and San Francisco Bay Area trains.

Service by PE from Los Angeles to the San Fernando Valley was commenced in 1911. By 1937 SP operated five daily passenger trains between Los Angeles and Oxnard over the Coast Line, three of which served numerous stations between those points.

The peak of the PE service was between 1923 and 1927 when it carried as many of 109,185,650 passengers annually and operated over 1,164 miles of track, exclusively in the Los Angeles Basin.

In 1904 SP completed dedication of the final portions of its "Coast Line" south of Santa Barbara through Oxnard and the Santa Susana Tunnel to Los Angeles as part of its mainline passenger service. Prior thereto train service between Los Angeles and Oxnard was serviced via Saugus over the "Santa Paula Branch" along the Santa Clara River.¹ SP had operated various trains in local service between Santa Barbara and Los Angeles and between Oxnard and Los Angeles over the Santa Paula Branch until 1934 and through the Santa Susana Tunnel route subsequently.

With the advent of the freeway system, PE service was gradually discontinued pursuant to Commission authorization and was completely discontinued in 1967. By the same token, SP passenger train service over the Coast Line was in large part discontinued pursuant to various Commission decisions or tariff filings from 1934 to 1968. The last trains operated by SP over the Coast Line were the Coast Daylight

¹ See Appendix A.

Trains Nos. 98 and 99, which were taken over on May 1, 1971 by Amtrak pursuant to Section 401 of the Federal Rail Passenger Service Act of 1970.

Proposed Service

In addition to the eight "El Camino" passenger cars owned by County, eight additional passenger cars for the second train would be acquired by Caltrans. Both trains would be operated on weekdays between Los Angeles and Oxnard in accordance with the following schedules, each would have a running time of one hour and thirty minutes:

Train 302 a.m.	Train 300 a.m.	Mile	Station	Train 301 p.m.	Train 303 p.m.
6:30	6:00	407.8	Oxnard	6:30	7:00
6:29	6:09	416.6	Camarillo	6:21	6:51
6:40	6:20	427.1	Moorpark	6:10	6:40
6:52	6:32	437.5	Santa Susana	5:58	6:28
7:04	6:44	445.5	Chatsworth	5:46	6:16
7:10	6:50	449.9	Northridge	5:40	6:10
7:17	6:57	455.0	Panorama	5:33	6:03
7:24	7:04	460.5	Airport	5:26	5:56
7:29	7:09	471.6	Burbank	5:21	5:51
7:36	7:16	477.1	Glendale	5:14	5:44
7:50	7:30	482.8	Los Angeles	5:00	5:30

According to a senior marketing consultant for the Division of Mass Transportation of Caltrans, the running time result in an average speed of 44 mph based upon the assumption of a 30-second dwell-time at each station with reasonable assumptions for acceleration and deceleration. In the event that the proposed running time cannot be met, it is the intention of complainants to protect the Los Angeles Union Terminal arrival and departure times.

The proposed zone fares are as follows:

	Between Los Angeles And	(5-Day) Monthly Commutation	20-Ride "Family" Ticket 60-Day Limit	Single Ride One-way Fare
Red Zone 1	Glendale Burbank Airport	\$33.75	\$24.40	\$1.45
Green Zone 2	Panorama	36.40	27.90	1.70
Orange Zone 3	Northridge	43.00	31.45	2.10
Blue Zone 4	Chatsworth	50.60	36.60	2.55
Yellow Zone 5	Santa Susana (Simi Valley)	56.25	41.25	3.00
Brown Zone 6	Moorpark	60.60	46.05	3.30
Purple Zone 7	Camarillo Oxnard	60.00	60.60	4.20

It is estimated that less than 20 percent of the tickets sold would be one-way tickets. Monthly tickets would be sold at both the Los Angeles and Oxnard stations and vending machines would be used at intermediate stations. Tickets would also be sold on the trains and could be purchased by mail or at banks as well as at places of employment.

Complainants presented evidence supporting a significant current demand for the proposed passenger service. This demand was based on complainants' forecast of ridership, future anticipated problems and costs related to fuel, the success of the current rail passenger service between Los Angeles and San Diego, and current State and local planning policies directing and urging rail transit service. Complainants estimate that between 1,100 and 1,400 riders would use the proposed commuter service daily in each direction if two trains are operated. The estimate is based upon the regional travel computerized model developed by the Los Angeles Regional Transportation Study (LARTS), which was used for projecting transit ridership for the Southern California Association of Governments' (SCAG) regional transportation plan.

The model projected potential demand of 1,825 riders for a 24-hour home-to-work transit service. The projection was reduced to reflect the service of two trains operating at a 30-minute interval. This was done by assuming that the proposed service would attract 60 percent to 75 percent of the peak-hour patronage for each station served.

Cost and Subsidization of Proposed Service

Senate Bill 620, which was approved by the Governor of California on June 28, 1979, provides a total of \$36 million to be allocated over a three-year period for the payment of actual and reasonable deficits resulting from rail passenger service within the State. Of this amount \$21 million may be used to meet operating expenses and \$15 million may be used for capital improvements.

The chief of the Division of Mass Transportation for Caltrans estimates that the first year costs for operating the proposed service would be \$3.54 million and \$5.25 million for the three years covered by the legislation.

A breakdown of his estimates is as follows:

FIRST-YEAR COSTS

Start-up (Stations—parking)	\$1.10 million
Equipment44 million *
Operations	2.00 million
Subtotal	\$3.54 million
Less income from fares	- .80 million
Total	\$2.74 million

SECOND-YEAR COSTS

Equipment	\$4.44 million
Operations	2.00 million
Subtotal	\$2.44 million
Less federal support	— .18 million **
Less income from fares	— .80 million
Total	\$1.66 million

* Cost for one train. No cost included for the cost of County passenger cars.

** Estimated federal funds that the service would qualify for under Section 5 of the Urban Mass Transportation Act of 1964, as amended.

Caltrans' estimate of capital costs gave no consideration to extensions of sidings, improvement of switches, dispatching, signalized traffic control, nor additional traffic.

Of the 11 stations to be served, only the Los Angeles, Oxnard, and Glendale stations are presently in use as passenger stations. The remaining eight stations would have to be provided with platforms and parking lot facilities.

The cost of constructing a platform, parking facilities for one-half of the patrons expected to board, and installing of automatic ticket machines at each station is as follows:

	<i>Cost Without Shelter</i>
Burbank	\$164,800
Airport	140,900
Panorama City	178,000
Northridge	182,500
Chatsworth	154,300
Santa Susana	166,000
Moorpark	150,000
Camarillo	156,000
Rounded Total	1,300,000

No cost was provided for the acquisition of property because all proposed sites are on public or SP property. Shelters were excluded because Caltrans estimated that each shelter would cost \$68,000. No provision was made for restrooms, fencing, or lighting at the parking lots; however, lighting would be provided at all station platforms.

Public Witnesses

A total of 96 individuals expressed support for the proposed service, 16 under oath and the rest in the form of statements of position. Included were a number of public officials as well as representatives of public and private agencies.³

³ (a) Congressman James Corman; (b) Assemblyman Robert Cline; (c) Mayor Cathie Wright, Simi Valley; (d) Board of Supervisors, Ventura County; (e) City of Oxnard; (f) City of Los Angeles; (g) Ventura County Air Pollution Control District; (h) Simi Valley Chamber of Commerce; (i) Advocates for Disabled Inc.; (j) City of Camarillo; (k) Southern California Rapid Transit District; (l) City of Burbank; (m) Los Angeles County Transportation Committee; (n) Los Angeles Area Chamber of Commerce—Public Transportation Committee; (o) West County Committee for Commuter Rail Service; (p) Senior Citizens—Simi Valley; and (q) Citizens for Rail California.

The majority are residents of Simi Valley, a few reside in Camarillo, Claremont, and Moorpark. In general, they indicated that they would use the proposed service to and from work in the Los Angeles area primarily because of the high cost of gasoline and to avoid those problems experienced during gas shortages. Others indicated that rail service offered a more convenient and comfortable mode of travel than the freeway and that use of the trains would help to reduce smog.

Many of those who attended the hearings work for Lockheed in Burbank and several were concerned because the schedules as proposed would arrive too late for employees who must be at their jobs by 7:00 a.m.

Representatives of public agencies also emphasized the environmental impact that rail passenger service would have in reducing the use of the private automobile. They pointed out the need to reduce traffic congestion in the densely populated southern California area as well as the pressing need to conserve energy.

A representative of Southern California Rapid Transit District (RTD) testified that RTD does not have enough equipment to meet the demands for local metropolitan bus service, much less the number and type of buses that would be required to provide extended service to and from points in Ventura County; however, he stated that the district would be ready, willing, and able to provide bus service that would interface with the proposed rail service at the Los Angeles Union Terminal station.

Testifying in opposition to the proposed service were representatives of General Motors Corporation (General Motors), Weyerhaeuser Company, Anheuser-Busch Inc., and Northridge Company. All expressed concern that the proposed passenger service would interrupt and delay rail freight shipments moving to and from their respective plants.

General Motors operates an assembly plant at Van Nuys, which is equipped with 10 industrial tracks used for the purpose of receiving rail cars via SP consisting of components shipped from eastern points. The plant, which was built in 1946, has grown to the point where it presently employs 5,500 individuals and is capable of producing 1,080 cars a day.

The general manager of the plant testified that SP acts as an extension of the production line and any delay in the delivery of freight cars could adversely affect production.

Anheuser-Busch Inc. also operates a plant in Van Nuys that has 1,000 employees and is served by SP. In addition to inbound rail shipments and approximately 40 outbound rail shipments, the plant also receives one switch movement a day. A proposed expansion program, which is

scheduled for completion in 1981, will result in an additional 1,000 employees and tripled capacity.

The assistant traffic manager for Anheuser-Busch Inc. testified that any delay in the switch movement would result in higher labor costs.

The manager of Weyerhaeuser Company, which is located at Sepulveda in the San Fernando Valley, testified that the company receives 60 to 70 rail car shipments per month of lumber and plywood via SP as well as two switch movements a day, and if the mid-day switch is late for any reason, it would have an adverse effect on production and would result in additional overtime to unload the cars.

The president of Northridge Lumber Company, a retail lumberyard located at Northridge, testified that SP provides a switch service at approximately 2:00 p.m. daily and any delay to the switch would result in overtime because it takes two hours to unload and his crew works from 7:00 a.m. to 4:00 p.m.

Defendant's Showing

SP contends that, if authorized, the rail commuter service would seriously interfere with and disrupt its freight operations. Defendant also contends that a dependable rail commuter service cannot be provided between Los Angeles and Oxnard.

The proposed operation falls within SP's Santa Barbara subdivision which extends from Los Angeles to San Luis Obispo. The track facilities between Los Angeles and Oxnard, a distance of 66.1 miles, consist of double tracks from 11.2 miles between Los Angeles and Burbank Junction and single tracks for 54.9 miles between Burbank Junction and Oxnard. The tracks, both double and single, are protected by automatic block signals which warn of the presence of a train ahead but do not instruct the engineer. Trains meet and pass according to timetable schedules, rule book, and train orders issued by the dispatcher. In contrast to other subdivisions where Central Traffic Control (CTC) has been installed and communications are almost instantaneous, operations over the proposed tracks are less flexible because of the lag-time between the dispatcher's train movement decision and its execution by the train crew. The basic points at which trains can be contacted are:

Los Angeles Yard	4.3 miles
Burbank Junction	11.2 miles
Gemco	18.4 miles
Oxnard	66.1 miles

The Los Angeles Union Pacific Station (LAUPT) is a train order station for Amtrak and does not issue orders to the Santa Barbara

subdivision. Los Angeles Yard is a train order station for freight operating to and from Taylor Yard. Gemco is used only for trains or engines originating or terminating at Gemco and is not staffed to handle train orders for through trains. At the present time the only points that could be used for providing train orders along the single track would be Burbank Junction and Oxnard. Side track facilities that are available for the purpose of meets and passes on the single-track segment between these points are located at the following locations:

Miles	Station	Capacity
11.3	Burbank Junction	5,300 feet
28.4	Chatsworth	5,544 feet
36.4	Santa Susana	4,912 feet
46.8	Moorpark	4,056 feet
57.3	Camarillo	7,108 feet

Another siding is located at Hewitt 15.5 miles from Los Angeles, but it has been taken out of use as a siding and is presently used as a makeup track in connection with operations at Gemco.

Amtrak trains range up to 200 feet, local haulers and switchers 200 feet to 6,000 feet, and freight trains from 8,000 feet to 10,000 feet.

According to defendant, the effective lengths of track for Chatsworth, Santa Susana, and Moorpark are substantially reduced because said rail facilities are intersected by busy public streets and roads. This requires trains to be cut so that the intersections are not blocked.

When a siding is not long enough to accommodate a train, "saw-by" and "back-saw" activities are then employed. A "saw-by" requires the inferior train to pull into the siding leaving its rear cars on the main tracks, while the superior train moves along the main tracks up to the rear cars. The inferior then pulls the rear car clear allowing the superior train to pass. A "back-saw" results from one train overtaking another on a single track and requires the inferior train to pull through the siding until the rear cars clear the main tracks. After the superior train clears one end of the siding, the inferior train backs up until the head end is in the siding allowing the superior train to proceed. Such movements can take from 10 to 45 minutes to complete, but apparently are not too frequently used on this segment of track. During the month of June 1979 no "back-saw" movements were employed and "saw-by" activities were used on only four occasions.

(1) Interference Study

To determine the extent of possible conflicts SP conducted an interference study covering the period July 1, 1978 to and including June 30, 1979. (Exhibits 46 and 47.) The study was prepared by superimposing the proposed commuter schedules over train operations actually conducted between Los Angeles and Oxnard during that period.

Before considering the interference problems or the feasibility of the proposed operation, it is necessary to have some understanding of the Gemco and Taylor Yards and the part they play in SP's overall operation in serving the area between Los Angeles and Oxnard.

Gemco

Gemco is the heart of SP's freight operations serving the San Fernando and Simi valleys. Freight cars are brought to Gemco from Taylor Yard by trains known as the Chatsworth Haulers. Upon arrival at Gemco the cars are switched for delivery to local industries by industrial switchers.

The yard consists of nine yard tracks, which are supported by a drill track and two ladder tracks. Track 109 with a length of 4,300 feet is the longest in the yard. The west end of the yard adjoins a drill track known as Budweiser Extension.

The major movement into Gemco consists of freight cars loaded with auto parts for General Motors. On the return trip to Taylor Yard the haulers take empty auto parts cars destined to eastern suppliers, multilevel rail carloads of new automobiles, and carloads of general commodities loaded by local industries for out-of-state distribution.

The 12:30 a.m. hauler leaves Taylor Yard between 2:00 a.m. and 4:00 a.m. and arrives at Gemco between 3:00 a.m. and 5:00 a.m. It then occupies the main track for approximately 90 minutes in order to switch out the train. About 9:00 a.m. it departs Gemco for the return to Taylor Yard with a consist of empty auto parts cars.

The 10:00 a.m. hauler departs Taylor Yard at approximately 1:30 p.m. and arrives at Gemco between 2:30 p.m. and 3:00 p.m. Again, switching operations take about 90 minutes. In preparation for its return the hauler begins to build its train of tri-level cars loaded with new automobiles at approximately 6:00 p.m., which would be after the east commuter train had passed. Because of the length of such trains, this activity is done on the main track.

An extra Chatsworth Hauler operates five days a week to handle loaded auto parts from the east and its on-duty time is dependent upon the arrival time of an inbound auto parts train at Los Angeles. There are occasions when it is necessary to operate as many as four or five extra haulers a day in order to bring urgently needed loaded auto parts cars (hot cars) to Gemco and their arrival at Gemco could be any time during the night or day.

Taylor Yard

Taylor is the principal freight yard for general commodity traffic serving the Los Angeles area and is located west of SP's main line between Los Angeles and Burbank Junction. Five major arteries of SP's operations in the Los Angeles Basin converge on the yard, i.e., the Santa Barbara Subdivision, the Bakersfield/Mojave Subdivision, the Colton Subdivisions (Alhambra Line and State Street Line), and the Los Angeles Terminal District.

Trains are received in "A" yard, inspected and then brought over the "hump" and allowed to roll down to a series of classification tracks, where outbound trains are made up.

The yard contains engine repair and servicing facilities, car shops, car repair facilities, scales, load-shifting tracks, and cleaning tracks.

On those occasions when the yard's capacity has been reached, tracks not normally used for the receipt of inbound trains are used by trains that are waiting to be yarded. The main tracks are also used for the purpose of making up of trains.

All movements into, out of, and within the yard are subject to the control of the yardmaster who may hold them out or within the yard to facilitate operations. A dispatcher is, therefore, unable to exercise complete control over the times that freight and passenger trains leave the yard.

Enlarging the capacity of the Taylor Yard's existing bypass tracks poses a problem because the yard extends up to the river. SP estimates that it would cost approximately \$43,379,000 to construct a bypass track on a cantilever structure that would extend out over the river for a distance of 4,000 feet.

With existing facilities SP contends that all through freight trains and many Los Angeles Basin locals could possibly conflict with the commuter trains.

The current schedule for trains arriving and departing Taylor Yard is as follows:

<i>Arrivals</i>		<i>Departures</i>	
<i>Train</i>	<i>Time</i>	<i>Time</i>	<i>Time</i>
BSMFF	0800	LABRT	0001
BSMFZ	0800	LAEUJ	0800
GULAP	0800	LAEST	0400
AVLAT	0800	LAEUJ	0400
CILAY	0800	LABKY	0530
OALAY	1230	LADAT	0530
BSMFY	1300	LARIP	0545
WCLAY	1300	LAOAF	0800
BRLAT	1345	LAHOT	0630
RUCY	1400	LAUT	0700
RVLAY	1430	LAPXT	0800
OALAT	1500	AMTRAK #13	1015
OAEY	1530	LAWCY	1230
WCOAY	1700	LAESH	1300
EULAY	1745	LAOAY	1400
PTCY	1800	LAPKY	1400
AMTRAK #13	1830	RUCY	1430
WJLAP	2200	LAESH	1645
PTLAY	2200	OAEY	1700
WCLAZ	2200	WCOAY	1730
HOLAT	2230	LAWCY	1830
MSMF	2330	PTCY	1900
APLAA	2330	LAWCY	2000
		WCWJZ	2100
		LAWJZ	2200
		LABRF	2330

Amtrak Trains

The afternoon commuter trains would conflict with the Amtrak Coast Starlight train which is due in Los Angeles at 6:55 p.m. Although the actual performance of the Coast Starlight train is unpredictable on a daily basis, it is scheduled to leave Oxnard at 5:11 p.m. and is due at Burbank Junction and double track facilities at 6:17 p.m. The commuter trains would leave Los Angeles at 5:00 p.m. and 5:30 p.m. and are due at Burbank Junction at 5:21 p.m. and 5:51. If on schedule, the commuter trains and the Coast Starlight would meet on the single track. The last point that the dispatcher could control the commuter trains would be Burbank Junction. Based upon past operations of the southbound Amtrak train, the dispatcher would probably allow timetable meets to take place.

Chatsworth Haulers

According to SP, the Chatworth Haulers would have the following number of delays if the commuter trains had operated during the 149 service days covered by the period from January through July 1979:

Month 1979	Train Movements		Delays Attributable to Commuter Trains	
	Eastbound	Westbound	Eastbound	Westbound
January	86	87	7	10
February	81	85	4	4
March	94	97	13	8
April	84	82	8	14
May	88	93	8	12
June	87	85	8	14
July	82	78	3	13
Total	602	607	51	75

Industrial and Plant Switchers

Five regular plant switchers are used to serve General Motors and SP's subsidiary Pacific Motor Trucking Company at Gemco. Also, operating out of Gemco are four regular industrial switchers that serve industries within the Gemco area. Two additional industrial switchers, operating out of Taylor Yard, are used to serve industries in the Glendale and Burbank areas.

Operating out of Gemco are: the Van Nuys Local, the 8:00 a.m. Industrial Switcher, the Northridge Local, and the Vega Switcher. Operating out of Taylor Yard are the Glendale Switcher and the Burbank Switcher.

Van Nuys Local

The Van Nuys Local leaves Gemco at 8:30 a.m. and returns at 5:00 p.m. It serve Adolph Food Products, Aetna Lumber, American Forest Products, Apollo Tire Co., Georgia-Pacific, Gold Key Furniture, Hendricks Builders Supplies, Hull Lumber Co., MacKay Lumber Co., Neiman-Reed Lumber Co., North Hollywood Glass, Oroweat Baking Co., Tarzana Lumber Co., Terry Building Center, and team tracks at North Hollywood, Van Nuys, Encino, Tarzana, and Canoga Park.

If the Chatsworth Hauler is delayed as a result of a meet with one of the morning commuter trains, then such customers as Adolph Food Products, Aetna Lumber, American Forest Products, Georgia-Pacific, Corp., Oroweat Baking Co., and Tarzana Lumber would lose 24 hours transit time on inbound traffic because of their cars would not make connection with the Van Nuys Local.

8:30 a.m. Industrial Switcher

This switcher usually takes about an hour and a half to line up its work and is ready to go out on the main track at 8:30 a.m. after Amtrak goes by. It serves Anheuser-Busch, Bell Brand Foods, Chandler Lumber, Continental Can, Joseph Schlitz, Safeway Stores, McMahan's Warehouse, Department of Water & Power, East Valley Distributors, Weyerhaeuser, and the team tracks at Raymer.

It normally switches Weyerhaeuser in Sepulveda at 11:00 a.m.; Safeway, Bell Brand, and Continental Can at approximately 11:15 a.m.; East Valley Distributors (Coors) at approximately 11:30 a.m., and Anheuser-Busch at 11:45 a.m. to 12:00 noon. Because of coordinated activities relating to supervision, loading and unloading crews, and connecting tracks, these customers depend upon timely switches. Any delay to the Chatsworth Hauler could delay their switches.

Northridge Local

The Northridge Local goes on duty at 9:10 a.m. and serves Andrew Lumber, Joseph Schlitz Container Division, Morse Electric Products, Waadt Appliance, Serv-a-Portion, Sears Roebuck, Rekir Laboratories, Levitz Furniture, A. M. Lewis, Frye Copying System, Northridge Lumber, Far West Plywood, Terry Building Center, Scipter Mfg., Simi

Valley Lumber, Southern Standard, and the team tracks at Northridge, Chatsworth, Santa Susana, and Simi.

The cars for the Northridge Local are switched out by the 8:30 a.m. Industrial Switcher at Gemco. If they cannot be switched out because of a delay to the Chatsworth Hauler, the departure of the Northridge Local from Gemco would also be delayed.

Vega Switcher

The Vega Switcher goes on duty at 6:30 p.m. serving Bestway Distributors, Joseph Schlitz, Neckerson Lumber, Frontier Building Supply, Container Service, Forest Plywood, Purified Down, Mullen Lumber, Bohemian Distributors, J. J. Newberry, Wates Lumber, and the team track at Hewitt.

Glendale Switcher

The Glendale Switcher goes on duty at Taylor Yard at 3:59 p.m. and departs between 4:30 p.m. and 5:00 p.m. to serve Van De Kamps Bakeries, Freight Distributors Corp., Glendale Depot Team Track, West Glendale Team Track, Transco Envelope Co., Empire Tire Co., Pride Products, Rail Chemical Co., and the Burbank team track.

One of its customers, Freight Distributors, has to have all freight cars removed before 6:00 p.m. so that the company's own trucks can be loaded with the freight that had just been delivered.

Van De Kamps Bakeries also requires an early switch so that its own trucks can be spotted and loaded for distribution of its products.

Burbank Switcher

The Burank Switcher commences at 11:59 p.m. and covers the same district as the Glendale Switcher carrying new inbound cars to various customers. At about 6:00 a.m. this switcher reverses directions and serves Burbank Lumber, Swaner Lumber, Dietel Lumber, Terminal Refrigeration, Borman Steel, Andrew Jergens Co., American Can Co., Economy Packaging, Levitz Furniture, Glass Insulators Co., Jack Isbell Co., Glendale Ready Mix Co., Ceuch Products, Ralph's Grocery, Sanetek Products, and Interpace, Inc.

If this switcher is held at Burbank for the morning commuter trains, all switching on the return trip to Taylor Yard would be delayed accordingly.

According to SP's interference study, train and switcher movements would have experienced the following delays for the period January through July 1979 if the commute trains had been operating:

Train	No. Delays	Minutes	
		Total	Average
APLAA	19	313	16
AVLAT	9	197	22
BELAKLY	4	86	22
BSMF/K/Z	29	383	14
BRLAT	21	448	21
CILAY	15	313	21
DOWCK/Y	3	40	13
ECWJS	23	1,083	44
DOLAY	22	389	18
DOLLLOL	9	145	16
ERWCK/Y	5	170	34
EULAK/Y	4	195	49
ITLAY	1	17	17
GUWCP	6	107	18
EUWCY	1	8	8
LAAYT	7	49	7
LAOAK/Y	35	2,981	54
LANKK/Y	21	266	13
LAMJY	14	389	28
LAWJK/Y/Z	30	1,349	42
LBBKY	1	40	40
LAEUJ	4	59	15
LACTZ	8	106	13
LAPKK/Y/T	13	178	14
LAASY	2	25	13
LADOK/Y	29	306	11
LAESH	1	26	26
LAOAF	60	1,715	29
LAHOT	6	48	8
LAEUJ	6	306	50
LABRT	1	22	11
MJLAM	10	177	18
HOLAK/T	9	156	17
MPLAY	2	22	11
MPLAK	2	65	33
OAWCK	13	426	33
OAWCY	34	2,517	47
OALAK	9	600	67
OALAT	47	2,988	64
OALAY	19	1,042	55
OAAJY	1	42	42
PTCIK	1	106	106
PTCIY	1	26	26
PTLAY/K	21	866	41
PXLAK	2	37	19
TULAY/K	8	134	19
TPLAK	2	31	16
RVLAY	3	111	37
WCRVY/K	2	55	27
WCOAY/K	2	31	15
WJECO	19	473	25
WJLAP/Y/K	3	132	44
WCERY	40	1,709	43
WCLAM	17	376	22
WJLAY	6	216	36

The APLAA (auto parts train), which originates in East St. Louis, is handled on an expedited basis and in reality is part of the General Motors Assembly operation. General Motors has limited storage at the plant and any delay of this train could result in a shutdown.

The LABRT departs Taylor Yard at 12:01 a.m. daily except Saturday carrying new automobiles as well as other highway competitive traffic for points in the Pacific Northwest. To protect the scheduled departure, the new automobiles from General Motors should leave Gemco by 8:00 p.m. and arrive at Taylor Yard no later than 9:00 p.m. for transfer, blocking, mechanical inspection, and train makeup. It takes an hour and a half to make up the Chatsworth Hauler on the main track, and this could not be commenced until the second commuter train had passed Gemco about 6:00 p.m. If Amtrak #13 were running late, the makeup of the hauler would be further delayed, and it is quite possible that the new automobiles could miss the 9:00 p.m. deadline.

The highest priority coastline freight train is the LAOAF, comprised primarily of Bay Area trailer-on-flat car and container-on-flat car merchandise and auto parts. This train is scheduled out of Taylor Yard at 6:00 a.m. If held until 8:00 a.m. to avoid conflict with the commuter trains, it would risk poor meets with the Amtrak train which would further delay its arrival in the Bay Area.

The LAOAF makes two important connections at San Jose. The first is the Permanent Local, which is scheduled out of San Jose at 12:30 a.m. carrying freight forwarder traffic which must be spotted at the freight forwarders in San Francisco by 2:00 a.m. The second is with the SJOAH, which leaves San Jose by 1:00 a.m. carrying automobile parts to assembly plants in Warm Springs and Milpitas.

In addition, the LAOAF handles time-sensitive traffic to the Port of Oakland that must be placed prior to 7:00 a.m. According to SP, it is presently working close to the limit in making scheduled connections and delivery times, and any further delay to the performance of the LAOAF would assertedly have extremely serious consequences.

The OALAT carries high priority trailer-on-flat car, container-on-flat car, and automobile traffic from the Bay Area to Los Angeles. It is scheduled to connect with expedited trains scheduled to depart Los Angeles between 4:00 a.m. and 6:30 a.m. with automobiles and other high priority traffic for St. Louis, Dallas, Houston, New Orleans, and connecting railroads at these points. It must arrive at Taylor Yard by 6:00 p.m. so that cars destined for eastern cities and southern cities can be switched out and blocked, mechanically inspected, and placed in the proper connecting schedule such as LAEST, LAHOT, LAAVT, and LAPXT. If the OALAT is delayed, its traffic will miss the expedited trains from Los Angeles, which cannot be held because they carry other high priority traffic.

The OAWCY carries traffic for City of Industry and connecting schedules at West Colton. It must arrive at City of Industry before 8:00

p.m. so that cars destined to the Buena Park and Anaheim areas can be humped and switched to connecting local services. Traffic on the OAWCY destined to eastern and southern points must arrive at West Colton before 10:00 p.m. to make necessary connecting schedules.

The OALAY carries general freight from Oakland to points in Los Angeles Basin. Cars on this train are transferred to satellite yards which cover the various industrial areas surrounding Taylor Yard. They must be transferred by 12:00 midnight in order to be placed on local switchers that will be going out on the day shift.

Another expedited train is the ECWJS which seasonally carries sugar beets from the Imperial Valley to the sugar beet factory at Betteravia near Guadalupe. Sugar beets have little or no storage life and must be handled promptly.

The LAWJ trains operate along the coastline serving customers at outlying points. SP claims that it has received complaints from customers located between San Luis Obispo and Burbank Junction concerning service by this train and is trying to improve its performance. Additional delays will aggravate the problem.

WCERY trains carry traffic for points on the Northwestern Pacific Railroad. Interference with these trains could result in service delay to such points as San Rafael, Santa Rosa, and Ukiah.

(2) Reliability of Proposed Service

SP contends that the proposed commuter service would be extremely unreliable because of the inherent problems relating to the nature of the track facilities, the type of equipment to be used, the lack of station facilities, and complainants' failure to adequately plan for the sale and collection of tickets as well as the personnel necessary to conduct the overall operation.

Schedules

A study prepared on behalf of SP by Reimer Associates concluded that the public need and support for the rail commuter service should be substantiated before commencement and that an alternative analysis should be made.

According to the SP study, an additional 24 minutes should be added to the schedule because of the nine commuter stops and the amount of dwell-time that would be related to each stop.

SP argues that if the public witnesses had been told that the running time would be closer to one hour and 54 minutes, without any conflict delays, the enthusiasm voiced would have been markedly dampened.

The modified schedule, taking into account acceleration and deceleration factors and station dwell-time, is as follows:

<i>#301</i> <i>Leave</i>	<i>#302</i> <i>Leave</i>	<i>Station</i>	<i>#300</i> <i>Arrive</i>	<i>#302</i> <i>Arrive</i>
5:00 p.m.	5:30 p.m.	Los Angeles	7:30 a.m.	7:50 a.m.
5:17	5:47	Glendale	7:12	7:32
5:36	5:56	Burbank	7:03	7:33
5:33	6:03	Airport	6:56	7:16
5:43	6:13	Panorama	6:46	7:06
5:51	6:21	Northridge	6:38	6:58
5:58	6:28	Chatsworth	6:31	6:51
6:13	6:43	Simi-Santa Susana	6:14	6:34
6:29	6:59	Moorpark	6:00	6:20
6:44	7:14	Camarillo	5:45	6:05
6:54 p.m.	7:24 p.m.	Oxnard	5:36 a.m.	5:56 a.m.
Arrive	Arrive	(66.1 miles)	Leave	Leave

Because of possible freight and Amtrak conflicts, the study concluded that the modified schedule could be prolonged another 45 minutes resulting in an overall running time of two hours and 39 minutes.

SP contends that the longer running time would substantially reduce complainants' estimated patronage because the LARTS estimates assume a high quality rail service that is reliable and dependable day in and day out. Erratic performance, serious delays, and unavailability of back-up transportation would, according to SP, be intolerable to prospective commuters.

SP further contends that complainants' patronage estimates are overstated by at least one-half because complainants erroneously assumed that peak hour service could be provided at all points on the line. It claims that complainants designed the proposed schedules to accommodate patrons working in the Los Angeles central business district and failed to consider the commuter requirements of those working in the areas of intermediate stations. According to the SP study only 516 of potential riders as identified by the LARTS model would work in the downtown Los Angeles area.

Equipment

The basic difference between complainants' proposed schedule and the modified schedule set forth in the SP study is in station dwell-time or the time allowed for the purpose of picking up and discharging passengers. The proposed schedule allows for a 30-second dwell-time and the SP study concludes that a 3-minute dwell-time will be necessary at each intermediate station.

According to SP the major factor contributing to the longer dwell-time is attributable to the type of equipment to be used. Although the second train has not as yet been acquired, the El Camino set consists of cars built in the 1940's for long-distance passenger service having conventional narrow doors of the era. Modern commutation equipment

has not only wide doors, but also low-slung steps so that passengers can step directly onto the platform. Although the modern commutation car is used chiefly in most rail commutation service, the El Camino type is still used to a limited extent in commuter service on the San Francisco Peninsula and in the Chicago area.

SP claims that each doorway on the El Camino train would require a train employee to raise the vestibule trap, lower the swinging stair, and position a step-box on the platform. If three train employees are used as proposed by complainants, then only three doors will be opened; and with passengers getting on single file, the traffic flow will be reduced, resulting in a longer dwell-time. All eight of the El Camino cars are Waukesha-equipped. SP claims that repair parts for Waukesha units are no longer available.

Fare System

The proposed fare system appears to be modeled after SP's San Francisco Peninsula commuter operation, but SP contends that the El Camino train is not compatible with the inspection and collection system used on the peninsula. Because five of the eight cars are medium density intercity coaches with reclining seats, two are buffet lounge cars, and one is a vista-dome observation car, SP claims they would not facilitate an expeditious inspection of passes or fare cards nor the punching of tickets. This would require a system of holders for multiple-ride tickets, passes, and fare cards to be installed at a uniform height so that the fare collector could move quickly throughout the car.

Under the proposed plan, 20 percent, or approximately 140 passengers, would purchase their tickets from the conductor on the train. This, SP contends, is unrealistic because it would take anywhere from 70 to 140 minutes of the conductor's time because each cash fare delays the conductor or helper conductor from 30 seconds to one minute.

Except for the terminal stations, all intermediate stations would be unattended and tickets would be sold by way of automatic ticketing machines, which SP believes is not feasible because the machines do not have a high reliability factor. Based upon an earlier review of available automatic ticketing machines for possible use at peninsula commutation stations, SP was led to conclude that the automatic ticketing machine would require frequent service, frequent collection of funds, and a human agent nearby to adjust patron complaints, retrieve torn bills or bent coins, and post the "out-of-order" signs when necessary.

Station Facilities

All SP station operations between Los Angeles and Oxnard have been discontinued pursuant to Commission procedure or as a result of service instituted by Amtrak. All station facilities at Los Angeles, Glendale, and Oxnard are operated by Amtrak personnel.

Although complainants propose to enter a contractual arrangement with Amtrak to provide station facilities and services, including the sale of tickets, at Los Angeles, Glendale, and Oxnard, SP is of the opinion that the proposal to construct platforms equipped only with lights at all other intermediate stops is too bare-boned and lacks the amenities that should be provided to passengers waiting for the trains.

According to SP, the proposal contains nothing for the passengers' comfort and convenience, such as shelters, waiting rooms, toilets, and drinking fountains. No provision is made for lighting and security for cars left in the parking lots. Nor does complainants' proposal make any provision for police protection against pickpockets, offensive panhandlers, aggressive inebriates, bullying, and violence.

SP points out that complainants' proposal is further deficient because the stations will be unattended and no provision has been made for informing waiting passengers when a train is running late or when a train can be expected. Provision would also have to be made for providing the public with information as to schedules, rates, fares, and lost property.

SP further points out that complainants failed to take into consideration that many of the old station properties, as well as properties designated by complainants as possible parking areas, are presently under lease to tenants who have made substantial alterations and improvements at their own expense.

Locomotives

In their proposal complainants envisioned the use of three locomotives in the range of 2,500 to 3,000 horsepower. Based upon its experience in pulling the Amtrak Coast Starlight, which has equipment similar to the El Camino train, SP believes that at least six horsepower per ton is needed to operate at maximum speeds required by the schedule. SP contends that a large locomotive would be required to pull the one percent grade leaving Simi Valley and also to provide the necessary acceleration after leaving stations and restricted curves. SP believes that even a 3,000 horsepower locomotive would fall short of maximum and that a 3,600 horsepower unit would be required.

SP also believes that four locomotives would be required rather than three. Although a third locomotive at Oxnard would provide a backup

if the regular locomotive could not start in the morning, it would not provide a solution to a problem of breakdown en route or a failure on the return from Los Angeles in the evening.

Another problem which SP calls attention to is the fact that the El Camino cars require a steam line for heating purposes and for hot water in the lavatories. At one time this was provided by steam locomotives. With the advent of the electric diesel locomotives an auxiliary steam generator was installed in each locomotive. With normal retirements and rebuilding programs, the steam-generator-equipped units have virtually all been removed from SP's service, with the exception of units which are assigned to the San Francisco Peninsula commutation fleet.

Because of the heavy demands on its own operations, SP claims that it cannot lease any of its own locomotives. As of August 31, 1979, it assertedly was leasing 141 units from other railroads.

Home Terminal

SP believes that Oxnard would probably be the home terminal for the commuter trains. If so, SP claims that it not only has no track facilities to accommodate the trains overnight, but it has no extra board at Oxnard. If a crew member calls in sick, his replacement would have to come from the Los Angeles extra board. Because a reasonable time to report is provided after a call has been received, a last-minute sick call or layoff would assertedly cause a delay to the train.

Equipment Maintenance

At one time SP had an extensive passenger coach yard in Los Angeles where periodic heavy repairs were made and it maintained a large force for the purpose of sweeping and vacuuming the interior of cars, dusting, washing windows, mopping floor, cleaning lavatories, restocking paper towels, and washing the exterior of cars.

All of the repair facilities have since been dismantled and the maintenance forces have since been disbanded. According to SP it has no such forces at Los Angeles nor at Oxnard.

Supervision

The commutation service and all supporting services would have to be coordinated and supervised. SP claims that it has no passenger service supervisors in the Los Angeles area.

(3) Growth of Area and Expansion of Conflict Problem

The Los Angeles sales district manager testified that during the past 30 years he had seen a rapid growth and development of manufacturing, merchandising, and service industries along the right-of-way from Los Angeles and extending through the San

Fernando Valley to Ventura County. With the growth of industry there was a corresponding development of new homes.

According to the witness, SP's traffic volume for the years 1974 through 1979 also experienced a substantial growth which he expected would continue in the foreseeable future. With increases in carload business, he testified, there has been a constant service problem because of the physical limitations of the railroad plant. Because a number of industries on the coastline receive a switch every working day and plan their operations around the rail deliveries, a delay of even one or two hours in switching would, according to the witness, lead to a flood of customer complaints.

The witness expressed the opinion that freight service demands on the railroad will increase and the proposed commuter trains would seriously impair SP's efforts to provide efficient rail transportation which is vitally needed to meet the requirements of existing timetables and the future economic needs of the area.

(4) Estimated Costs for Providing Service

A transportation analyst in the Bureau of Transportation Research of SP prepared an estimate of costs for operating the proposed service including an estimate for interference with SP's freight trains, but excluding locomotive and car costs, and it is as follows:

<i>Estimated Costs</i>	
Interference	8843,961
Supervision and support	107,484
Station forces	341,916
Insurance	500,000
Property rents	300,000
Breakdowns	84,417
Banking	5,380
Crew expense	1,089,873
Uniforms	3,800
Locker rooms	1,000
Deadhead lodging	5,080
Transportation	7,557
Train and engine crew expense	839,461
Replacement training expense	59,067
Relief crew training expense	4,580
Fringe benefit expense, replacement employees	107,614
Extra board costs	31,334
Police and security	587,259
Patrolman positions	313,389
Police and security to guard train at Oxnard	843,980

Estimated annual fuel consumption would be 216,734 gallons.

The estimate is based upon long-run variable costs and makes no provision for maintenance of ways, because of incomplete data. No allowance was made for a possible Caltrans subsidy.

The interference cost of \$243,961 was based upon SP's interference study, which showed that January through July 1979, 55 through trains would experience 23,975 train minutes of delay waiting for the commuter trains, or 685 hours per year, on an annualized basis. It also indicated that there would be 28,814 minutes of delay to 19 identified local and yard engine movements, or approximately 823 hours 15 minutes on an annualized basis. The estimated cost per minute is as follows:

<i>Through Train</i>	<i>Component Cost per Minute</i>
Locomotive ownership cost	\$.000289/h.p. minute
Car ownership cost	.0061/car minute
Caboose ownership cost	.218/cab. minute
<i>Local Train Delay Costs</i>	
Locomotive ownership cost	\$.000289/h.p. minute
Car ownership cost	.0061/car minute
Caboose ownership cost	.218/cab. minute
Labor cost	1.0482/minute

Delay costs made no attempt to measure traffic losses that would result from missed connections.

The estimated cost of \$500,000 for insurance was based upon a quotation given by the London brokerage firm of Cedrick, Forbes, Beard & Paine, which gave a range of \$435,000 to \$535,000 on a \$1.5 million deductible.

SP's present coverage, including its San Francisco commuter operation, provides for a \$5 million deductible and covers up to \$46 million per occurrence. The premium is \$3.5 million annually. It is possible that complainants could be added to the existing policy at a cost less than \$500,000 annually, but SP contends that it would be better to have a lower deductible on a new operation where no past experience is available for the purpose of comparing prior commuter operations on the same tracks.

The \$200,000 cost for property rents covers incomes that SP would lose on that property upon which proposed stations, platforms, and parking lots would be located and which is presently under lease to others or being held for future commercial lease.

(8) SP's Current Financial Condition

SP contends that it cannot afford to provide the proposed service because of its poor financial condition. It claims that its financial condition at the end of 1978 was weaker than it was in 1969 and, although 1979 showed improved financial results, they are still, assertedly, below a satisfactory level. According to SP's manager of financial services in its Treasury Department, the company's financial deterioration during the past ten years has resulted from an erosion of

earnings accompanied by increasing capital requirements. Inflation, he testified, has had an impact not only with respect to higher wages, material, fuel, and equipment costs, but through increased interest rates on borrowed money. According to the witness, SP's rate of return has been inadequate over the past ten years and will continue to be below its cost of borrowing. SP, he testified, cannot afford to see its line capacity reduced with a resulting loss of future freight profits.

The witness further testified that SP is presently experiencing difficulty in raising new capital at reasonable rates because of inadequate earnings; over the last ten years SP had to raise \$826 million through the issue of debt securities and approximately \$230 million of new debt will be issued to finance its 1979 capital program; SP's rate of return during the past ten years has fluctuated at depressed levels; in 1978 the rate of return was 1.62 percent and during the best year it was only 3.22 percent, with an average of 2.36 percent; and before SP would inaugurate any new service, including the proposed commuter service, the new service would have to make a contribution to the company's financial standing.

SP also introduced as an exhibit "Result of California Intrastate Freight Traffic". Exhibit 85 was prepared and introduced in an unrelated proceeding to show that a general freight increase, as applied for, would result in an increase in revenues that was not unreasonably high. The exhibit claims that SP's California freight operations were earning less than a break-even amount.

Complainants' Rebuttal Showing

In rebuttal to SP's presentation, complainants introduced the testimony of four witnesses. Their testimony is summarized as follows:

1. *Laurence A. Brophy*

Mr. Brophy is presently employed by A. T. Kearney, Inc., a management consultant firm located in Chicago, Illinois. For twenty-five years he was associated with the Illinois Central and the Elgin Joliet and Eastern Railway in various capacities including Assistant Trainmaster, Trainmaster, Assistant Superintendent and Superintendent. For a period of time he was responsible for the operational supervision of yard switch engines and industrial switch engines working inside a large steel plant, U. S. Steel South Works in Chicago, Illinois. He was also vice-president and chief operating officer of the Chicago Railroad Terminal Information System, which was founded in 1972 by the 24 railroads of Chicago for the purpose of providing all carriers with freight train and car movement information within the Chicago rail terminal.

He testified that after reviewing the testimony of SP witnesses and inspecting the proposed facilities he concluded that:

- (1) Two additional trains would not adversely affect operations at Taylor Yard and within the Los Angeles Terminal.
- (2) The proposed commuter trains would not represent a potential congestion problem between LAUPT, Dayton Tower, Los Angeles Transportation Center, and Mission Tower.
- (3) The proposed commuter trains would not interfere with operations at Gemco.

With respect to specific operations Mr. Brophy made the following observations:

(a) *Taylor Yard*

Operations at Taylor Yard are controlled by the Dayton Avenue interlocking station operator. Crossover tracks into A yard from the west to the east main are also controlled by the Dayton Avenue tower and switches from the eastward main to the lead as well as switches to tracks in A and C yards are controlled by the main line tower. There was little or no delay to freight trains entering A yard or departing C yard because most of these switches are electronically controlled.

Trains were frequently left on the westward main for train crew changes, even though yard tracks were available for such purposes. This practice reduces yard operation flexibility. The main tracks should be kept clear at all times. If for any reason a train is on the westward main, two yard tracks immediately adjacent to the eastward main can be used to run westward trains around the blocking train.

Checked Assistant General Yard Master's turnover at Taylor Yard to determine the number of Coast and Valley Division trains departing west (north) from C yard during the week of July 1979. Out of 37 trains 21 experienced terminal delay. (Terminal delay occurs when a train does not leave the yard within 75 minutes from the time the crew is called.) Checked to determine the method used to call trains and the time when trains departed. Trains frequently didn't depart until two hours after being called. This is because SP does not yard trains properly and fails to use its yard facilities as dictated by operating conditions. The flexibility of yard operations is greatly hampered by the practice of main lining trains instead of yarding them.

The main line tracks and the auxiliary tracks in A and C yards between the west and east end of Taylor Yard are under the direct control of operators and switchtenders, which should, and does, expedite passenger, freight trains, and light engines over this portion of the terminal tracks.

The problem of trains being held out on the main tracks is one of SP's making and would not be attributable to the operation of the proposed commuter trains.

- (b) *Operations Between Dayton Tower, Los Angeles Transportation Center, Mission Tower, and LAUPT*

Train movements to and from Dayton Tower and Los Angeles Transportation Center are controlled at the west end by Dayton Tower and at the east end by Mission Tower. Movements into and out of LAUPT are controlled by Mission Tower. Although the traffic was heavy, no unusual delays were noted. The movements to and from Taylor Yard by the Alhambra Switcher, Torrance Switcher, City of Industry Assignment, Junction Hauler, the Yard Hauler, and the UP Hauler would not be affected by the addition of two passenger trains in the morning and afternoon hours. These yard transfer movements are controlled between Dayton and Mission Towers.

During June 4, 1979, and June 8, 1979, there were 54 train and light engine movements between Dayton and Mission Towers between the hours of 5:30 and 7:30 a.m., and 4:30 and 6:00 p.m. Only eight movements could have possibly been delayed by operation of the commuter trains.

SP's problem in this area is one of coordination. The scheduling of two first-class trains will force a certain amount of discipline in the matter in which SP conducts its freight train operations.

- (c) *Burbank Switcher*

Industries located between Taylor Yard and Burbank Junction, which are served by the Burbank Switcher, would not be adversely affected by the operation of the proposed commuter trains. There are ten different locations on the double track segment in which the Burbank Switcher can clear for other trains and still do its job. It will not be delayed for an hour each day as SP claims. A review of the Burbank Junction Station records for the first week of June 1979 indicates that Burbank Switcher had returned each day to Taylor Yard in time for the same engine to be used on the midnight Burbank Switcher assignment. The records also indicate that during the same period the Burbank Switcher spent from 22 minutes to two hours daily at Burbank.

- (d) *Gemco Yard*

Gemco has a total of 31,309 feet of track room, which is equivalent to approximately 150-89 feet 9 inch auto rack, freight cars and over 300-32 feet 6 inch box cars. Auto rack and box cars constitute the major types of freight equipment used at Gemco. During the month of June 1979 (Saturdays and Sundays excepted) the consist of inbound trains averaged 131 cars with an average train length of 9,976 feet. The daily average of cars outbound, excluding the automobiles, was 180 with an average train length of 13,036 feet. There is sufficient yard room to accommodate the freight cars originating at and destined to Gemco.

The yard tracks are presently underutilized because cars from Taylor Yard are usually yarded on Track 109, which is the longest track in the Gemco facility. Track 109 and its extension (Budweiser Lead) can hold 10,000 feet of train length.

SP presently pulls cars from the Gemco Yard and makes up trains on the main line. These trains could be made up on Track 109 and the Budweiser Lead, thereby leaving the main line clear.

A check of train movements for the month of June 1979 indicates that there were 94 inbound trains and 7 of them would have been using the railroad during the commuter hours. During the same period there were 109 trains departing Gemco. Only 8 would have had any possible conflict with the commuter trains.

SP's Gemco Yard records indicate that during the month of June 1979 not one of the regular Chatsworth haulers nor any of the extra Chatsworth haulers carrying automobiles departed Gemco before 8:00 p.m.

Based upon a review of SP records and personal observations the commuter trains would not have delayed freight train movements, nor would they have delayed freight trains moving in and out of Gemco, nor would they have interfered with the make up automobile trains if they were made upon Track 109 and the Budweiser Lead.

Empty auto parts cars are taken from Gemco and placed on the Hewitt siding and the engine returns to Gemco. A subsequent movement of empties are taken from Gemco to Hewitt where they are connected with the first consist and all are then hauled to Taylor Yard. This not only results in double handling, but it ties up the Hewitt siding for 12 to 14 hours daily. It places a restriction upon the dispatcher because the siding could be used for the meeting and passing of trains.

(e) *"Hot" Auto Parts Cars For Gemco*

Observed movements of extra Chatsworth assignment from Taylor Yard to Gemco, but they moved during time periods when the commuter trains would not be operating.

"Hot" cars are those that have been delayed somewhere on the SP system and must be expedited. A search of SP's records indicated that such movements were not frequent. Gemco is only seven miles from Burbank Junction, the start of the double track segment. Any "hot" car movement conflicting with the commuter trains would result in only minimal delay because of the short distance involved.

(f) *Yard Operations at Gemco*

Yard operations at Gemco primarily consist of switching for the General Motors plant. There is a considerable amount of "slack time" or "spot time". (The engine remains stationary

for more than two hours.) There is plenty of time to switch and line up cars that are to be set in auto part Tracks 5, 6, 7, and 8. There is also time to classify the loaded automobile cars off Tracks 1, 2, 3, and 4.

The yard provides a great deal of flexibility, which if properly used would eliminate the need for tying up the Hewitt siding and would eliminate the need for making up trains on the main line.

Siding Capacity Between Burbank Junction and Oxnard

During June 1979, 50 freight trains operated between Burbank Junction and Oxnard and only 8 of them would not have fit in the sidings at Camarillo, Moorpark, Santa Susana, Chatsworth, or Hewitt.

To ascribe the possibility of delays to eastern bound trains to the operation of the commuter trains is without merit. Such delays are occurring at the present time and are attributable to SP's operating personnel. The introduction of the proposed commuter trains would impose a discipline in SP's practice of calling and operation of freight trains and thereby minimize any possible delay to passenger or freight trains.

2. Donald H. King

Mr. King retired as Regional Vice President of the Burlington Northern Railroad (BN) on December 1, 1977. At the time of his retirement he was in charge of the Chicago Region, which included 4,400 miles of track with approximately 9,600 employees. He was in charge of all commuter trains operating between Chicago and Aurora, a distance of 38 miles, and all freight movements. In addition, 4 Amtrak trains operated daily within the region. The region also included an important classification freight yard located at Cicero, which is approximately 28 miles east of Aurora. He made an inspection of the El Camino car, the terminals at Los Angeles and Oxnard, and the proposed intermediate station sites. As a result thereof he is of the opinion that the proposed service is feasible. Mr. King's observations and opinions are as follows:

(a) Equipment

The eight El Camino cars are in excellent condition and there is no reason why they cannot be operated successfully in commuter service. Railroads have used conventional coaches with single vestibule openings in commuter service for over 50 years; however, BN now uses gallery-type coaches with double vestibule doors that are automatically controlled.

Because of California's favorable weather conditions there would be no heating problems if the locomotives could not provide steam for heating the cars and hot water for the lavatories.

He believes that the installation of ticket holders or chips in the El Camino cars would facilitate the collection of tickets.

(b) *Home Terminal*

Believes that the home terminal should be Los Angeles, because it is an existing source of supply for crews. Crews could make the run to Oxnard, lay over and return to Los Angeles in the morning. Although this would require meals and lodging at Oxnard, it would eliminate the need for an extra board for enginemen and firemen at Oxnard. In the case of illness a replacement could be taken from a switch engine assignment at Oxnard, Los Angeles, or if necessary a supervising officer could be used.

(c) *Cleaning and Handling*

There appears to be sufficient space for storing the trains overnight on a house track next to SP's station at Oxnard or they could be stored on the nearby Ventura Railroad.

The cleaning at Oxnard would be minimal and would not require the services of more than one person to do a fast sweep of floors and to pick up debris. More extensive cleaning could be done at Los Angeles.

Ticketing

BN's experience on the sale of tickets has been:

- (1) 50 percent purchased at station.
- (2) 40 percent purchased by mail.
- (3) 7 percent cash fares, sold on train.

Daily cash sales on the BN totaled 3,200 for 72 trains or 56 cash sales per train. Using the same ratio the proposed trains would average approximately 21 cash fares per train, which can be handled with minimum difficulty. In any event the crew can always be increased to meet any problem, whether it be passenger loading or collecting tickets or fares.

(d) *Passenger Loading*

As the pattern of passenger boarding and unboarding develops management will determine the most efficient way of accommodating them by way of spotting cars at the platform stations and the number of coaches to be opened.

The BN No. 244 departs Aurora at 8:05 a.m. and stops at 20 intermediate stations before arriving at Chicago at 9:18 a.m., a distance of 38 miles. The dwell-time averages less than one minute per station. By prespotting cars at each station a minimum of coaches would have to be opened.

Crews could advise passengers what coaches to use to detrain. The El Camino train is also equipped with a public address system, which could be used to direct passengers to the proper cars.

In any event commuter passengers soon learn where cars will be spotted and what doors will be opened.

(e) *Station Facilities*

BN has 26 stations on its commuter line, 13 of which are manned and 13 are unmanned. Shelters are provided at most

stations, but of a windbreak type. There is no public address system at any of them. Most commuters wait in their cars and arrive at the platform just before train time. Very few use the stations or shelters. With California's nice weather, standing on the platform would be no problem. No toilet facilities are available at unmanned stations. The BN operates through populated areas, which are serviced with adequate street lights. The proposed area is quite similar.

BN does not provide parking on its property, except at Aurora. This can be provided by local authorities.

3. *Donald Church*

Mr. Church is Chief of Special Services Division of Los Angeles County, Chief Administration Office.

Mr. Church testified that El Camino cars were purchased by the County of Los Angeles for \$200,000; that each car had traveled approximately 40,000 miles at the time of acquisition; that pursuant to public bid the El Camino cars were completely refurbished according to the specifications set forth in Exhibit 98, and that the El Camino train is in a good and operable condition.

4. *William W. Whitehurst, Jr.*

Mr. Whitehurst is Executive Vice-President of L. E. Peabody & Associate, Inc., economic consultants, Landover, Maryland.

When the Railroad Revitalization and Regulatory Reform Act of 1976 was passed the Rail Services Planning Office (RSPO), which was required under the Act to issue standards for the determination of subsidies necessary for the continuation of rail commuter passenger service, commissioned the firm of L. E. Peabody & Associates, Inc. to make a study.

The firm also assisted in developing and negotiating the costing concepts and methodology by which the New Jersey Department of Transportation reimbursed various railroads for operating rail passenger service in New Jersey.

Mr. Whitehurst gave an historical account of the development of subsidy agreements between railroads and commuter authorities, the problems relating thereto and the methods explored to resolve them.

In general, the major items of revenue are solely related to either passenger or freight service and pose no serious problem; however, problems do arise in apportioning railroad costs for activities which are common to both freight and passenger services.

Items such as train and engine crew wages, fuel, maintenance, and servicing of equipment can usually be determined and will be essentially the same under any reasonable analytical approach, but items such as Maintenance of Ways costs and General and Administrative expenses can vary widely.

One approach is to determine costs on an avoidable basis by determining which costs would no longer exist or be reduced in the absence of a given service.

In each instance the railroad and public agencies had to deal with various components of cost including:

- (a) Operating expenses chargeable to passenger service;
- (b) Return on investment for rolling stock and fixed facilities;
- (c) Responsibility for liability;
- (d) Impact on other rail operations.

Amtrak operates over the lines of various railroads which are part of the Amtrak system under a basic agreement and amendments thereto. The basic agreement was entered into on April 16, 1971, and provides for reimbursement of railroad costs which are solely for the benefit of the passenger service plus avoidable costs reasonably and necessarily incurred.

In the case of insurance, Amtrak indemnifies the railroad from liability for Amtrak employees, passengers, rolling stock, other property, and Amtrak train accidents at highway crossings. The railroad indemnifies Amtrak for railroad employees, equipment, and property. In consideration Amtrak pays the railroad \$0.0367 per Amtrak train-mile.

None of the Amtrak agreements include provision for payment of claims arising from interference with freight operations.

The RSPO commuter standards (49 CFR 1127) provide for an interpretation of the standards by the filing of a written petition.

The RSPO standards rely primarily on a Facilities Utilization Plan and a Manpower Utilization Plan for determining costs chargeable to a commuter service. The facilities plan identifies and itemizes the road and equipment properties used in the commuter service and also identifies the road properties that are avoidable upon discontinuance of the commuter service. The manpower plan identifies the railroad forces used in providing the service. The methodology for apportioning the variable portion of common costs is also provided.

In determining a return on investment for rolling stock and fixed facilities, the RSPO standards identify and establish values for avoidable properties. The total value is determined by taking the net book value as of April 1976, plus a value of additions and betterments for the commuter service, less the accrued depreciation from that date and all cost of modifying the remaining property so that noncommuter operations can be continued. Property owned by public bodies is not included. RSPO commuter standards provide for 7.5 percent per annum as a reasonable return.

In the case of liability the RSPO standards merely indicate that the subsidizer is responsible for any loss, damage, or personal injury resulting from the commuter service, but does not specify how such costs should be determined.

Greyhound's Showing

The purpose of Greyhound's presentation was to urge Caltrans to consider and implement a balanced transportation policy with due consideration of the inherent transportation advantages of all modes. According to Greyhound's Director of Operations, Programs, Greyhound is ready and willing to make an offer for a purchase service contract to Los Angeles County and Caltrans for a commuter bus service between Oxnard and Los Angeles.

According to the Greyhound witness, the United States' intercity bus industry is the largest and possibly the best public bus transportation system in the world; it is the most energy-efficient, least polluting, and most cost-effective; because of its flexibility, routing and capacity can be changed with minimal investment and equipment; and Greyhound has the range of resources to provide reliable and high-quality service between Oxnard and Los Angeles.

Pursuant to a written agreement, similar to one that Greyhound has with SamTrans in San Mateo County, Greyhound would provide the equipment, drivers, vehicle maintenance, and management that is required to operate the service.

The points to be served and the equipment to be provided based upon the LARTS ridership projections are as follows:

Station	LARTS Ridership Projection	Number of Buses Required	Capacity 47-Pass/ Bus
Oxnard	173	4	186
Camarillo	89	2	94
Moorpark	101	3	141
Santa Susana (Simi Valley)	264	5	235
Chatsworth	74	2	94
Northridge	64	2	94
Panorama	92	1	47
Burbank Airport	167	4	186
Burbank	70	1	47
Glendale	0	-	-
Los Angeles	0	-	-
	1,094	24	1,128

The travel time in the morning would be 1½ hours from Oxnard to Los Angeles and the evening travel time would be a maximum of 2 hours.

Greyhound estimates the annual cost to provide the service would be \$63,657 per bus or a total of \$1,528,000 annually for 24 buses. Deducting an estimated revenue of \$600,000 the annual subsidy as of the time of hearing would be approximately \$928,000, which according to Greyhound, would be substantially less than Caltrans would have to pay to subsidize the rail commuter service as proposed. Based upon an

inflation factor of 15 percent per year the projected cost would be \$1,757,000 with a net cost of \$1,157,000, which Greyhound claims compares favorably with Caltrans' estimate of \$1,844,000 and SP's estimate of \$2,400,000 for annual operating cost. In addition to the financial savings, Greyhound also points to the substantial fuel savings that could be realized by using buses rather than rail service. Greyhound estimates that the buses would use only 85,584 gallons of fuel annually as opposed to the 217,000 gallons of diesel fuel that SP estimated would be required to operate the locomotives.

George Woodman Hilton, professor of economics at the University of California at Los Angeles, who appeared on behalf of SP, cited authorities supporting Greyhound's position that buses can move people more cheaply than rail systems because operation of lighter vehicles require smaller fuel and labor inputs. According to the professor, the proposed rail service might take 900 cars off the highways daily, but this, he concluded, would only shorten the peak commuter period. He testified that people evaluate the convenience of an automobile in a fashion that can be quantified and believes that the expenditure on freeways could better be used by stretching out the commuter period by variable user charges. The professor claims that this would alleviate congestion moving in and out of metropolitan areas and could be accomplished by the installation of a technologically available metering process, which would require a highway user to pay a higher fee during the rush hours.

Discussion

Just as southern California generally has experienced a phenomenal growth in population and industrial development over the past thirty years so too has the area along the proposed rail route between Los Angeles and Oxnard. With the advent of freeways, two-car garages, and cheap gasoline the automobile has become the workingman's first love in the field of transportation. Resulting freeway congestion, pollution, receiver fuel shortages, and skyrocketing gasoline prices have slowly, but surely, turned that beautiful romance into a nightmare. This unhappy transformation was strongly evidenced by the large number of public witnesses, as well as public officials, who appeared in support of the proposed commuter service.

With hindsight one can only wish that the "Big Red Cars" were still in operation in Southern California, but they are a thing of the past and the only solution to the problem is that suggested by Professor Spencer Crump, who testified that the same imagination that was used 75 years ago to build the Pacific Electric system should be used to build a new transit system for the Los Angeles area in the 1980's.

In the meantime, alternate modes of public transportation are necessary, particularly to meet the needs and requirements of commuters between home and work. Unfortunately, this Commission cannot conduct the type of study that was suggested for assessing alternatives that a community might consider prior to filing an application for funds with the federal government.³ Nor can we decide whether a county, a transit district, or Caltrans should enter into a purchase service contract with Greyhound or with Mr. Nathaniel Walter Anderson, Sr., General Manager of GLH Tours, Inc., who testified that his minority-owned charter-party carrier company would be willing to provide a commuter service between Los Angeles and Oxnard if subsidized.

Greyhound may be in earnest in seeking to operate buses in this corridor under a subsidy similar to that offered to S.P. However, at the present time Greyhound is not authorized to serve all of the points along the proposed route. If Greyhound had filed an unconditional request for such certificated authority as a passenger stage corporation we could have considered the merits of both bus and rail services in detail before reaching a final decision. Since that is not the case, the only things we must decide are: (1) whether we have jurisdiction to require SP to provide the proposed commuter service; (2) whether the proposed commuter service is required by public convenience and necessity; and (3) whether a rail service would be feasible under existing conditions.

Jurisdiction

[1] SP has maintained throughout this proceeding that we have no jurisdiction to grant the relief sought by this complaint. This argument was first formally presented in a motion to dismiss the proceeding, which SP filed on October 6, 1978. We determined that SP's argument had no merit and denied its motion on February 27, 1979, in Decision No. 90018. SP did not pursue its right to seek judicial review of this determination and it thereby became final by operation of law. (Public Utilities Code Sections 1709 and 1756.)

However, SP reiterates its argument herein on the grounds that a jurisdictional challenge can be raised at any time; moreover, one of SP's witnesses claims that SP has subsequently developed additional facts supporting its position. SP's primary contentions are that it is not a common carrier of passengers in the southern California area and that it has never dedicated its facilities to the provision of commutation service on the line in question; therefore, the Commission lacks

³ According to Assistant Director and Transportation Policy specialist with the Senate Office of Research of the California State Senate, Senate Bill No. 680 does not require an alternative analysis before funds can be issued and none was ever intended.

jurisdiction to order it to provide such service. While we disagree with these arguments, we will address the issue again herein for the purposes of clarifying the rationale underlying our assertion of jurisdiction.

First, under its own certificate of incorporation on file with this Commission, there can be no doubt that SP is a common carrier of both passengers and freight in the State as a whole. That certificate states that the nature of SP's business and the objects and purposes thereof, are to:

"... do a general transportation business; to transport, carry, haul, distribute, deliver and handle passengers, freight, baggage, mail, express, goods, wares, merchandise and other property of every kind and nature by railroad, steamship, airplane, truck, bus, pipeline, and other means of transportation or by any thereof . . ."

Section 2169 of the Civil Code sets forth SP's common carrier responsibilities:

"[A common carrier such as SP] must, if able to do so, accept and carry what is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry."

In the course of this proceeding, County and Caltrans have offered evidence concerning the public's need for passenger service along SP's monopoly rail corridor and the ability of such agencies to provide the necessary train equipment and to reimburse SP for expenses incurred in running the trains. Moreover, much evidence has been presented concerning the degree to which SP's present freight operations would or would not be impeded if SP began hauling County's trains. Under these circumstances, we believe we have the authority to examine whether or not under Section 2169 of the Civil Code SP has a duty to accept County's proposal.

Secondly, we do not dispute the basic principle that dedication is a necessary element in this case. However, we disagree with SP's argument that the requisite dedication is not present.

[2] From the onset of State regulation over railroads as public utilities, the scope of their dedication has been primarily defined in terms of the rights-of-way over which they provide railroad service with no distinction made between passenger and freight service. Moreover, the record is clear that not only does SP still use the Los Angeles-Oxnard right-of-way and attendant structures and facilities for freight service, it formerly used that right-of-way to operate both local and long-haul passenger trains. While it received Commission authorization to discontinue certain trains^{*} and was relieved from the operation of others by the federal Amtrak legislation, we do not consider this to be

^{*} Public Utilities Code Section 7532, which gives the Commission discretion to discontinue certain specific lines, says nothing about irrevocable abandonment of service, nor do any of the Commission's decisions authorizing SP to discontinue certain lines.

tantamount to authorizing abandonment of its dedication to provide passenger service along this route should we determine that public convenience and necessity so require.

Concerning local service along the coast route, historical records indicated that SP as of March 20, 1904 completed the final link in what was termed the "Coast Line" by construction of the track, ties, ballast, and attendant structures on its right-of-way south of Santa Barbara through Oxnard and the Santa Susana Tunnel to Los Angeles. Local passenger service between Oxnard and Los Angeles was begun sometime thereafter. In 1934 the Commission permitted SP to discontinue local train service operating between Oxnard and Los Angeles via Saugus over the Santa Paula Branch. The order granting discontinuance specifically reserved to the Commission the right to "revoke the authority" to discontinue and "the right to make such further orders, relative to the matter, as to [sic] it may seem right and proper . . . if in its judgment, public convenience and necessity demand such action." (Decision No. 27612, Application No. 19352 (1934) 39 CRC 873 (unpublished); see Appendix B.) In this "reservation" the Commission clearly indicated its intent to authorize discontinuance *only for that period of time in the future that public convenience and necessity so permitted*. If in the future public convenience and necessity required passenger service, restoration would be ordered. We have not found any record of SP's having appealed this decision. Coupled with the authority cited below, this decision fully affords the Commission the right and obligation to consider the question of whether public convenience and necessity *presently* require the reinstitution of local, i.e., commute, passenger train service between Los Angeles and Oxnard.

It cannot reasonably be disputed that the Commission has the responsibility of ensuring that SP is properly carrying out its public utility³ and common carrier duties. Section 761 provides in relevant part that whenever the Commission, after a hearing:

" . . . finds that the . . . service of any public utility . . . [is] inadequate, or insufficient, the commission shall determine and, by order . . . fix the . . . service . . . to be . . . employed. The commission shall prescribe rules for the performance of any service . . . , and, on proper demand and tender of rates, such public utility shall . . . render such service within the time and upon the conditions provided in such rules."

Section 763 further provides that when the Commission, after a hearing:

" . . . finds that any railroad corporation . . . does not run a sufficient number of trains or cars, . . . reasonably to accommodate the traffic,

³ See Sections 211(a), 216(a), and 461.

passenger or freight, transported by or offered for transportation to it, . . . the commission may make an order directing such corporation to increase the number of its trains or cars or . . . may make any other order that it determines to be reasonably necessary to accommodate and transport the traffic, passenger or freight, transported or offered for transportation."

[3] We know of no cases restricting the application of this section to service presently being provided. The Commission may also, after hearing, order additions, extensions to, or changes in existing equipment or facilities, "to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, . . ." (Section 762.) In *City of Oakland* (1935) 39 CRC 308, the Commission held that it had jurisdiction under the predecessor of this section to consider a request for reinstatement of electric railway service that had been discontinued pursuant to Commission authorization.

[4] We consider the above authority to be fully consistent with our position that public convenience and necessity cannot reasonably be measured for all time on the basis of conditions existing in 1904, 1934, or 1965. The concept of public convenience and necessity is necessarily fluid. The factors which determine the level of service and the equipment adequate to serve the public will necessarily differ as populations grow or diminish and as other forms of transportation become more or less dominant. It is our opinion that if the right-of-way in question remains intact, if service similar to that proposed was once offered, and if no abandonment of either the right-of-way or of the duty to provide service along it has been authorized, SP's obligation to render both common carrier freight and passenger service remains and the Commission has the authority to reconsider whether or not public convenience and necessity require changes to present service.

[5] We do not consider the Amtrak legislation to be relevant to the question of the scope of SP's dedication under State law. Until October of 1978, that statute involved exclusively what is termed "intercity" rail passenger service.* The distinction between "intercity" and "commuter" services is germane to the scope of federal jurisdiction, but not to the issue of SP's dedication under State law. We acknowledge that where a railroad has contracted with Amtrak for the latter to take over intercity passenger service, the railroad is relieved of its responsibilities under State law as a common carrier of passengers, but in intercity service only (45 U.S.C.A. § 561(a)(1)). This does not affect any responsibilities SP may have to provide commuter service, nor does it affect the Commission's jurisdiction to determine the extent of such responsibilities.

* In October 1978 an amendment to the statute gave states the option of requesting that Amtrak run commuter trains pursuant to contract, as long as the state would pay a certain percentage of the operating costs. (45 U.S.C.A. § 563(d).)

Public Convenience and Necessity

We are convinced that the extensive use of the private automobile has placed large costs on the general public in terms of traffic congestion, environmental deterioration, energy consumption, the use of land required for roads and parking, and other socio-economic impacts. The Legislature has clearly announced its policy and intent to develop and encourage a balanced transportation system within realistic funding levels. Congress and the President support expanded rail transit. The transportation officials and regional planning agencies support the need to encourage and begin rail passenger service in this corridor. Caltrans' estimates of 1,100 to 1,400 passengers per day for the proposed train service, based on the regional transportation studies and plans, appear reasonable, if not conservative, measured against the success of other local passenger service in southern California and on the San Francisco Peninsula. Increased gasoline costs and potential fuel supply difficulties are also important elements in our decision that public convenience and necessity require this service to be instituted. Several passenger stations remain along the route and other points to be served can be accommodated by platforms and parking lot facilities. A sizable number of public witnesses support and urge the proposed service. We also believe that the support for this service from the local public officials, bodies, and organizations is an important element in our determination that the public convenience and necessity require this train service.

Adequacy of Existing Track Facilities

The single track segment of track between Burbank Junction and Oxnard does pose certain operational problems, but they are the same problems that railroads in the United States have dealt with for many years.

From Chatsworth south there are numerous support sidings on either side of the tracks that could be used if clear. Santa Susana with a length of 7,108 feet is obviously a dispatcher's best siding. Camarillo, Moorpark, and Chatsworth range from 4,056 feet to 5,544 feet. Although SP made frequent reference to the long freight train, a review of train activities during the month of June 1979, which SP indicated was an active and representative month, discloses that no freight trains were operated in excess of 7,108 feet and only eight exceeded 6,000 feet.

The movements of trains could be further facilitated if the Hewitt siding were returned to operation and if Chatsworth and Santa Susana were made train order stations. Another factor that would facilitate the

movement of trains would be the more extensive use of radio for giving train orders. SP claims that use of its radio raises certain labor-related cost problems when a train conductor performs the function of a train order operator. The important thing should be the movement of the trains and in a subsidized operation such as this, the additional cost for use of the radio should be the concern of Caltrans and not SP's.

Train Conflicts

SP's interference study was prepared by Michael R. Chavez, who is employed as Train Dispatcher, Los Angeles Division. He has worked as coast dispatcher on both day and night shifts, dispatching trains between Los Angeles, Burbank Junction, Oxnard, Santa Barbara, and San Luis Obispo and also serves as Relief Chief Train Dispatcher. Mr. Chavez was instructed to superimpose the schedules of the proposed commuter trains over the rail operations actually conducted between Oxnard and Los Angeles during the period covered by the study, noting the delays that would have been incurred had those trains been operating. He was not authorized to reschedule or redispach trains to avoid conflicts, but was told to designate all train operations within the period of 5:00 a.m. to 7:30 a.m. and 4:00 p.m. to 7:00 p.m. as conflicts attributable to the commuter trains. Mr. Chavez admitted that if SP were ordered to operate the commuter trains they would be meshed with the freight operations so as to reduce the possibility of delays as much as possible. As a consequence SP's interference study does not provide a true picture of what its coast line operations would be like if the commuter trains were authorized and it is of little or no value for the purposes of this proceeding.

If SP were so concerned about the potential of train interference it had the best possible source available to demonstrate the realities of the problem. If a study had been made of the actual operations of the Amtrak Coast Daylight Trains Nos. 12 and 13 for a one-year or six-month period we would have had before us far more helpful information in determining the merits of SP's contention. The Amtrak trains not only operate between the same points daily, but they are first-class trains that raise the same operational problems for SP that the commuter trains would raise. They operate over the same single track segment and past the same Gemco and Taylor yards. They have the same potential for conflict with the Chatsworth haulers, the "hot-cars", the eastern and north-western trains, and the various switchers and locals. If the study had been prepared, actual conflicts could have been tabulated and evaluated. From the very fact that such a study was not prepared we can only assume that SP, by appropriate dispatching, has

operated the Amtrak trains over its coast line routes without any significant problem of conflicts with other trains.

The morning commuter trains would pose no problem for the morning Amtrak train leaving Los Angeles, but if on schedule the evening Amtrak train would meet the commuter train on the single track. SP's contract with Amtrak provides that the trains will be considered "on-time" if the performance between Portland and Los Angeles is within 14 minutes of the schedule time. Since its new agreement was entered into in July 1977, SP has complied 75.4 percent of the time.

In the preparation of its interference study SP held the commuter trains in a siding to allow the Amtrak train to proceed claiming that it is a common railroad operational practice in the case of first-class trains to give priority to long-distance passenger trains over local passenger trains. Rule S-72 of the Operating Department Handbook provides that westward trains (in this case the commuter trains) are superior to trains of the same class if operating in the opposite direction. But, regardless of which train is given priority it is important to note that Mr. Chavez was of the opinion that it may be possible to arrange for a scheduled meet between the first commuter train and the Amtrak train at Chatsworth and if a siding is available a scheduled meet between the second train at Gemco.

The potential conflicts with the Chatsworth haulers appear to result more from the hour and a half that each handler spends on the main track at Gemco making up or switching out cars. We do not believe that this practice lends itself to an efficient operation, particularly if yard facilities for such purposes are available.

We are also of the opinion that there is merit in Mr. Brophy's observation that the inauguration of the commuter service would impose a discipline that would have a beneficial effect upon SP's overall coast line operation. It was not so long ago that SP operated a number of passenger trains and a vast number of freight trains over these same tracks with efficiency and a high standard for "on-time" performance.

Reliability of Service

A major portion of SP's presentation was introduced for the purpose of pinpointing deficiencies in the proposed commuter service. This included a detailed analysis of schedules, equipment, fares, station facilities, locomotives, home terminal, equipment maintenance, repairs, and supervision. The slightest operational problem was highlighted and magnified. A close review of this evidence discloses that it is primarily directed towards the quality of the proposed service

rather than its feasibility. Admittedly, the quality of a service can have a material effect upon patronage, but in the final analysis public acceptance or rejection can be determined only after a reasonable period of time has been allowed for necessary adjustments to be made by both the railroad and the commuting public.

Equipment

The El Camino cars have been completely reconditioned and refurbished. For all practical purposes their condition is the same as when they were first placed into service. By way of design they may not lend themselves to the high capacity nor expeditious means of loading and unloading passengers as the more modern type of commuter rail cars, but they would afford passengers a very comfortable means of commuting between home and work.

Locomotives

If the success of the proposed service requires the operation of four 3,600 horsepower locomotives then it will be SP's responsibility to see that they are made available. Whether the locomotives are equipped with steam generators is not essential. Steam-heated cars and hot water in the lavatories during certain periods of the winter months would be desirable, but not absolutely necessary.

Schedules

The estimated range of 1,100 to 1,400 potential patrons appears to be reasonable. Although SP questioned the reliability of the LARTS trip estimates because of the assertedly erroneous assumptions as to train schedules, headway, and performance, it did not question the accuracy or methodology of the study. In fact, the SP study adopted for its purposes the LARTS forecast of 1,825 passengers on a 24-hour basis. Although a longer schedule could reduce the estimated patronage the feasibility of the proposed schedules can only be determined from actual operations.

Whether it takes 30 seconds or three minutes at each station to load and unload passengers remains to be seen. To achieve the 30-second dwell-time it may be necessary to use a larger train crew so that more doors can be opened, or it may be accomplished by opening fewer doors and spotting cars at station platforms. As in all new operations, there undoubtedly will be a number of procedural and operational problems that will have to be tried and tested before the best methods are finally adopted. Hopefully, the testing period will be of short duration.

Ticket Sales

By an arrangement with Amtrak, tickets will be sold at the Los Angeles, Glendale, and Oxnard stations. Except for the occasional rider it is safe to assume that most passengers will purchase the discount tickets and it is further safe to assume that most of the commuter passengers will purchase their tickets by mail or at one of the attended stations.

A problem could arise for the commuter who has not had an opportunity to purchase a ticket by mail, and boards and unboards at unattended stations. The effectiveness of automatic ticket machines is questionable because of problems relating to breakdowns and change. Under the present proposal the alternative for the commuter would be to purchase one-way tickets on the train until a discount ticket could be acquired by mail.

The sale of cash fares by conductors presents no problem that cannot be solved by adding conductor-helpers to the crew as needed. If the number of cash fares should exceed the 20 estimated for each train, the helpers could be used not only for the sale and collection of tickets, but also to open additional doors at intermediate stations.

Station Facilities

An adequately lighted station platform and an easily accessible parking area should be sufficient to meet the needs of most commuters. The convenience of an enclosed station equipped with restroom facilities would be desirable but is not necessary. As a practical matter most commuters drive, or are driven to the station and remain in their cars until their train arrives. If any time is spent waiting on the station platform it is usually minimal and on most occasions a pleasant experience, particularly in Southern California with its favorable weather.

Police protection can be provided by local authorities and if the support for the proposed service is evidenced by local governmental authorities is any criterion, security should be no problem.

Home Terminal

Establishment of a home terminal is strictly an operational matter with which SP is fully familiar. On the surface it would appear that Los Angeles would be the logical choice because it would alleviate the need for establishing an extra board for enginemen and trainmen at Oxnard. The only additional costs would be for meals and lodging for crews laying over at Oxnard and replacements could be made from switch engine assignments at Oxnard or by supervising personnel. In any event, we feel sure that SP's decision will be operationally practical and cost-efficient.

Equipment Maintenance

SP may have substantially reduced its passenger maintenance facilities and personnel with the inauguration of the Amtrak service but it did not completely eliminate them. Pursuant to a contract with Amtrak the Southwest Limited trains which operate between New Orleans and Los Angeles and the Coast Daylight trains, are presently serviced by Amtrak at Los Angeles. Before leaving Los Angeles the trains receive a turn-around inspection and cleaning. All heavy maintenance and repair work for these same trains is done at SP's Oakland facilities, which are equipped with a drop-pit, Joyce electric jacks, and elevator tracks that are used for minute inspections.

There is no reason why a similar arrangement cannot be made for the cleaning and repair of the proposed commuter trains. Except for picking up discarded papers and debris at Oxnard, the major inspection, cleaning, and maintenance could be done at Los Angeles, while heavy repairs could be done at SP's Oakland facilities.

Supervision

Whether the successful operation of the commuter trains requires someone to supervise and coordinate the proposed service is an operational matter that can best be answered by SP. It would appear, however, that if necessary it could be performed by the same person or persons who performs these functions in SP's operation of the Amtrak trains.

Costs

There is no dispute that the proposed commuter service, if authorized, would be operated at a deficit. Since state subsidy funds are available there is no merit to SP's contention that the proposed service would constitute a financial burden. The only question is how the deficit is to be calculated. This can best be decided by SP, Caltrans, and County after a period of negotiations. We believe that a period of six months should be sufficient for such purposes. If not, additional time will be provided. During this period a subsidy account should be established and payments made as necessary to inaugurate and maintain service. Adjustments can be made after an agreement has been reached and actual costs are known.

We are of the opinion that SP should be compensated for those costs that are a direct result of the commuter service in addition to common costs as well as fixed costs that are a direct result of such service. The parties should use an avoidable or incremental cost methodology in determining cost of operations and subsidies.

During the period of negotiations we do not believe that any allowance should be made for costs attributable to the interference with freight trains. It is possible that a more disciplined effort will be made to coordinate the movements of the commuter and freight trains if there is no monetary cushion to soften the effects of conflicts to freight trains. By the same token this period of service will provide a more accurate account of the coordinated operations as well as a basis upon which such costs can be determined and paid if justified.

With respect to insurance we believe that until a claims history can be developed a new policy with a \$1.5 million deductible would be prudent. At a future date it may be advisable and more economical to have Caltrans and County added to SP's system policy.

In addition to costs we believe that SP is also entitled to a reasonable rate of return. This should satisfy SP's requirement that a new service must have a contributing effect on its financial standing. We are of the opinion that a 7½ percent return would not only be reasonable, but, according to figures presented in this proceeding, exceed SP's rate of return on net investment in transportation property for the past ten years.

Finally, while Caltrans does appear willing and able to reimburse SP for all reasonable deficits resulting from the operation of this needed service, it may be the case that SP will incur certain expenses that are not anticipated by the parties during negotiations. Should this circumstance arise, we will require that subsequent recognition be given to such expenses and that reimbursement be made. However, because of the sound overall financial health of SP, as well as its holding company, Southern Pacific Company, we believe SP is fully capable of absorbing a reasonable portion of such unanticipated expenses, if for some justifiable reason they should remain unreimbursed or if reimbursement is delayed.

SP should also be paid a reasonable rental for any of its properties used for parking or station platform purposes.

Complainants' Motion to Strike SP's Surrebuttal Showing

In accordance with Rule 57 of the Commission's Rules of Practice and Procedure the complainants were entitled to open and close. In this proceeding, however, the ALJ in the exercise of his discretionary authority (Rule 63) agreed to a surrebuttal presentation on the part of SP and upon completion of complainants' rebuttal presentation on December 5, 1979, continued the matter for a four-day presentation by SP commencing January 22, 1980.

In conformity with the established hearing procedure SP served copies of prepared testimony and related exhibits upon all parties ten days prior to the January 22 hearing. In addition, Greyhound Lines, Inc. and General Motors Corporation also served copies of prepared surrebuttal testimony and related exhibits on all parties, even though no provision had been extended to either party to make a surrebuttal presentation.

In reply to complainants' rebuttal presentation, which covered a period of two and a half days and called for the testimony of four witnesses, SP proposed to call eleven witnesses. The testimony of several of SP's surrebuttal witnesses would have covered as many as forty or fifty pages of prepared testimony. If taken with the testimony and exhibits that Greyhound and General Motors proposed to introduce, the total time that would have been necessary to complete the surrebuttal showing would have required an additional two or three weeks of hearing.

On January 21, 1980, complainants filed a motion requesting that all surrebuttal exhibits be set aside and the matter taken under submission. On January 22, 1980, following argument on the motion the ALJ sustained the motion.

On January 31, 1980, February 11, 1980, and March 6, 1980, General Motors, Greyhound, and SP, respectively, filed petitions to set aside submission for the purpose of receiving surrebuttal exhibits.

The petitions will be denied. No authority was ever extended to either Greyhound or General Motors to make a surrebuttal presentation. A review of SP's exhibits indicates that a substantial portion of its surrebuttal presentation would have been repetitious, argumentative, and rehabilitative of SP's case in chief.

We find no abuse of discretion on the part of the ALJ in sustaining the motion and we affirm his decision. All parties were afforded a full opportunity to be heard.

SP's Motion for a Protective Order

During the course of hearing, by letter dated October 25, 1979, staff counsel requested that the ALJ direct SP to provide a guided Hy-Rail inspection of SP's railroad properties between the Los Angeles station and Montebello, commencing at 9:30 a.m., Tuesday, November 6, 1979, for the purpose of transporting staff members on the requested inspection tour.

[6] The tour was never provided because SP claimed that the ruling was not received by SP's counsel until 12:00 p.m., November 6, 1979. On November 9, 1979 SP filed a motion for a protective order that it not

be required to provide the Commission staff and staff counsel with the requested inspection. Because the staff never renewed its request, the issue is now moot; and the motion will be denied. However, SP is placed upon notice that had such a tour been necessary for the staff to have a better understanding of SP operations and had the staff pursued its request for a tour the motion for a protective order would have been denied on the merits. SP's motion appears to be inconsistent when one considers that it was SP which raised the issue relating to the adequacy of its track facilities. More importantly, we wish to stress that it is essential that the Commission staff have full access to public utility property and facilities in order to conduct examinations and tests pertaining to the powers afforded the Commission and its staff in the Public Utilities Act. Public Utilities Code Section 771, as well as other sections, provides that authority. SP will not be permitted to frustrate our staff's exercise of the Commission's powers and functions by suggesting that the proposed inspection was not legitimate. We expect SP to recognize and cooperate with our staff's reasonable requests for inspection and examination of common carrier properties devoted to public utility purposes.

SP's Motion for an Environmental Impact Report

On August 8, 1979 SP filed a motion pursuant to Rule 17.1 of the Commission's Rules of Practice and Procedure requesting an order of the Commission directing complainants to either submit a negative declaration or an environmental data statement in compliance with the California Environmental Quality Act (CEQA).

Senate Bill 849, Chapter 791 of the Statutes of 1978 (Pub. Resources Code Section 2108.5) provided for the following exemption from CEQA:

"A project for the installation or increase of passenger or commuter service on rail lines in use, including modernization of existing stations and parking facilities, shall be exempt from this decision."

Although the exemption applies only to existing stations and parking facilities the type of construction proposed by Caltrans (i.e., open platforms and paved parking areas) is categorically exempt from the Environmental Impact Report requirements of CEQA.

"(C) Class 3 Exemptions

"3. Accessory (appurtenant) structures to utility structures including garages, carports, patios and fences." (Rule 17.1(h) (1) (C)3.)

The motion will be denied.

Findings of Fact

1. SP completed construction of the final portion of its main line over its right-of-way known as the "Coast Line" between Santa Barbara and Los Angeles, through Oxnard and the Santa Susana Tunnel, in 1904, which right-of-way, with attendant trackage structures and facilities, continues to be used for common carrier purposes.

2. SP has never been authorized to abandon its "Coast Line" right-of-way between Los Angeles and Oxnard by the ICC or by this Commission.

3. SP has operated various trains over the years since 1904 which provided local passenger train service between Oxnard and Los Angeles over the Santa Paula line until 1934, as well as through the Santa Susana Tunnel until at least 1937.

4. The Commission in 1934 in Decision No. 27612 permitted discontinuance of certain local train service between Oxnard and Los Angeles, but reserved the right to revoke the authority to discontinue such service if public convenience and necessity so demanded, and said decision and order was not appealed by SP.

5. SP has never been authorized by the ICC or this Commission to abandon or discontinue all passenger train service in the State.

6. SP refused a formal request to haul certain passenger cars owned by County between Los Angeles and Oxnard.

7. Extensive use of the private automobile has helped to cause traffic congestion, environmental deterioration, energy consumption, and the use of land for roads and parking, as well as other detrimental socio-economic impacts.

8. A policy of the State Legislature, as well as that of the U.S. Congress and the President, is to encourage and develop a balanced transportation system, including expanded rail transit service.

9. Regional and local governmental officials and planning agencies support and encourage commuter rail service in the corridor between Los Angeles and Oxnard.

10. A significant segment of the public witnesses supports commuter rail passenger service between Los Angeles and Oxnard.

11. It is reasonable to expect that from 1,100 to 1,400, or more, passengers per day will use the proposed commuter train service.

12. We find that based on the evidence adduced on this record, public convenience and necessity require that SP commence passenger train service between LAUPT and Oxnard consisting of two trains daily, each way, between 6:00-8:00 a.m. and between 4:00-6:00 p.m., with intermediate stops at stations or platforms at Camarillo, Moorpark, Santa Susana (Simi Valley), Chatsworth, Northridge, Panorama, Airport, Burbank, and Glendale.

13. SP's overall financial condition, as well as that of its holding company, will enable it to bear any reasonable expenses of the service not fully reimbursed by Caltrans.

14. The complainants and SP should engage in negotiations leading to an agreement to render the service ordered herein.

15. SP can accommodate its existing freight service offered along the coast line between Oxnard and Los Angeles with the proposed commuter trains with minimal impact with the adoption of reasonable measures by SP to eliminate conflicts and impose greater discipline in its overall coast line operation.

16. A major portion of the SP coastline track facilities between Los Angeles and Oxnard is single track with side tracks at four locations. The movement of trains, including the commuter trains, could be greatly facilitated if the Hewitt siding were returned to operation and Chatsworth and Santa Susana were made train order stations. The use of radio for the purpose of issuing train orders would also be a factor in facilitating the movement of trains over the single-track segment.

17. SP's interference study does not accurately reflect the train conflicts that would result if the proposed commuter service was authorized because the study was prepared by superimposing the commuter operation over past freight operations without any attempt to avoid conflicts by redispatching trains. A more accurate and helpful study would have been an account of the conflicts resulting from the operation of the Amtrak Coast Daylight trains, which also operate daily over the same track facilities.

18. SP's Gemco and Taylor yards pose a potential problem for conflicts with the proposed commuter trains, but a major contributing factor is SP's practice of making up trains on the main tracks adjacent to both yards. Better utilization of yard facilities, more efficient yard operations, and a stricter discipline in the calling and operation of freight trains would minimize possible delays to passenger and freight trains because of conflicts.

19. The proposed rail commuter service is feasible. Initially certain operational problems will be experienced but these can and should be resolved following a reasonable period for operational and public adjustment.

20. It will be the responsibility of SP to provide adequate locomotives. If it is necessary to use four 3,600 horsepower locomotives to assure a dependable on-time service and an adequate source of backup power, then this requirement will have to be met if public use and confidence are to be established and maintained.

21. To achieve and maintain a 30-second station dwell-time may require a larger train crew in order that more train doors can be opened for the loading and unloading passengers. As an alternative cars may be strategically spotted along the platform and fewer opened, but this is a procedure that could be tried during the period of adjustment.

22. Discount tickets may be purchased at the Los Angeles, Glendale, and Oxnard stations; they may also be purchased by mail, and one-way tickets may be purchased from the train conductor. This should provide a reasonable opportunity for all who are interested in using the proposed service. The proposed use of automatic ticket machines at unattended stations may pose some problems, but if so the other methods of purchasing tickets should be sufficient.

23. Adequately lighted station platforms with access to parking areas will meet the needs of most commuters. Construction of enclosed shelters equipped with restroom facilities is not necessary.

24. Selection of a home terminal for the proposed commuter trains is an operational matter that will have to be determined in accordance with practical and economic considerations.

25. Complainants have eight passenger cars available for service, which have been reconstructed and refurbished. They are in excellent condition and are more than adequate for use in the proposed service. Complainants will provide eight additional passenger cars to make up the consist of the second train and they will be made available prior to the commencement of service.

26. All heavy maintenance and repair of the passenger cars will be the responsibility of complainants. Heavy repairs and major cleaning can be performed pursuant to an agreement with Amtrak.

27. All light cleaning and running repairs of the passenger cars will be the responsibility of SP and can be performed by SP personnel at its Los Angeles facilities.

28. Operating deficits resulting from the service are to be subsidized by state funds pursuant to an agreement to be negotiated by the parties. The agreement should compensate SP for direct out-of-pocket costs. During the course of negotiations consideration should be given to the RSPO Commuter Standards, which provide a reasonable method for determining direct, indirect, and common costs. A period of six months would be required to negotiate such an agreement. In the event the parties desire this Commission's assistance by way of interpretation it will be available.

29. Pending final agreement between the parties a subsidy account in the amount of \$1.3 million should be established for the purpose of inaugurating the proposed service and for construction by SP of station

platforms and parking facilities in accordance with plans and specifications to be prepared by CalTrans and filed with this Commission for its approval.

30. No allowance should be made for costs attributable to the interference with SP's freight trains.

31. Until a reasonable claims history can be developed a new insurance policy with a \$1.5 million deductible should be obtained to cover the proposed service.

32. In addition to meeting deficit costs, the subsidy should provide SP with a 7½ percent rate of return, which we find to be just and reasonable.

33. Certain SP properties, upon which station platforms and parking areas would be installed, are presently subject to written leases containing 30-day cancellation clauses. SP should be paid a reasonable rental for any properties that are used for such purposes.

Conclusions of Law

1. SP is a common carrier of freight and passengers between Los Angeles and Oxnard and subject to the jurisdiction of this Commission.

2. SP completed legal dedication of its right-of-way with attendant structures and facilities to common carrier purposes between Oxnard and Los Angeles following completion of said construction in 1904.

3. SP is a common carrier of passengers and freight over its dedicated rights-of-way. The obligation remains for SP to render that service which the Commission finds is required by public convenience and necessity.

4. The authority granted SP to discontinue certain local passenger trains in service between Los Angeles and Oxnard was not an irrevocable grant of the right to cease all passenger train service thereafter nor was such authority to discontinue specific trains an acknowledgment that SP had "retracted" its dedication to passenger service.

5. If the Commission subsequent to discontinuance of certain train service finds that public convenience and necessity require reinstitution of passenger train service along a railroad's right-of-way dedicated to common carrier service, it may order that train service be operated.

6. The passage of the National Rail Passenger Service Act of 1970 did not authorize SP to refuse to render commuter passenger train service thereafter.

7. Civil Code Section 2169 sets forth, in part, SP's common carrier duties and provides a statutory basis for the Commission to consider the merits of the complaint filed herein.

8. Public Utilities Code Sections 761 through 763 provide additional statutory authority for the Commission to consider the merits of County's and CalTrans' complaint.

9. Pursuant to the conditional grant of authority to discontinue passenger train service in Decision No. 27612, the right to revoke such authority if public convenience and necessity so require remains with the Commission. SP's failure to seek review of said decision renders the matter final on the merits.

10. The evidence in this public record indicates that public convenience and necessity require that SP commence operation of rail passenger service between Los Angeles and Oxnard as proposed by complainants.

11. We affirm the conclusion reached in Decision No. 90018 that SP is a common carrier of freight and passengers between Los Angeles and Oxnard and subject to the jurisdiction of this Commission. A copy of Decision No. 90018 is attached hereto as Exhibit A.

12. This Commission has no statutory or constitutional authority to determine how subsidy funds available under Senate Bill 620 should be distributed or apportioned.

13. Inauguration of a rail commuter service between Los Angeles and Oxnard requires no alternative analysis study nor environmental impact report. Construction of station platforms and parking lot facilities is exempt from the provisions of CEQA.

14. SP should be required to operate the proposed commuter trains in accordance with the requirements of the ensuing order.

ORDER

IT IS ORDERED that:

1. Within thirty days after the effective date hereof, the State of California Department of Transportation (CalTrans) shall submit to Southern Pacific Transportation Company (SP) and file with this Commission locations, plans, and specifications for station platforms and parking facilities.

2. Within ninety days after receipt of the plans and specifications provided for in Ordering Paragraph 1 hereof, SP shall construct the platforms and parking facilities in accordance with said plans and specifications and shall, upon ten days' notice to the Commission and the public, commence operations of two commuter passenger trains between Los Angeles and Oxnard with intermediate stops at Camarillo, Moorpark, Santa Susana (Simi Valley), Chatsworth, Northridge, Panorama, Airport, Burbank, and Glendale. Said service shall be

provided subject to the condition that CalTrans shall subsidize deficits resulting from such operation.

3. SP shall operate the rail service provided for in Ordering Paragraph 2 hereof between the hours of 6:00 a.m. and 8:00 a.m. and between 4:00 p.m. and 6:00 p.m. daily, Monday through Friday, holidays excepted.

4. Within thirty days prior to the commencement of service by SP, complainants shall establish to the Commission's satisfaction that:

- (a) Two consists of eight rail passenger cars each are available and ready to be used in service.
- (b) Arrangements have been made for the maintenance of rail cars and for the sale of tickets.
- (c) An escrow account has been established containing deposits of \$1.3 million for the purpose of constructing station platforms and parking facilities and a deposit of at least one-half of the estimated cost of first-year operations as set forth in Exhibit 9.

5. Within one hundred eighty days after the effective date hereof SP, CalTrans, and the County of Los Angeles shall negotiate and submit to this Commission for its approval an agreement relating to the equipment and facilities to be used in providing said commuter service and the method to be applied in subsidizing deficits that may result therefrom.

6. During the period of negotiations funds deposited in the escrow account provided for in Ordering Paragraph 4(c) hereof, shall be used for the purpose of inaugurating and maintaining the commuter service. When an agreement has been reached and actual costs have been determined adjustments will be made accordingly.

7. Within sixty days after the effective date hereof, and on not less than ten days' notice to the Commission and to the public, SP shall amend its tariffs and timetables on file with the Commission to reflect the service herein authorized and ordered.

8. The petition for a proposed report as well as the motions to set aside submission for the receiving of surrebuttal evidence and the motion for a protective order that a "Hy-Rail" tour need not be provided are denied.

9. All objections, motions, and petitions filed in this proceeding and not specifically ruled upon are denied.

The effective date of this order shall be thirty days after the date hereof.

Dated June 3, 1980, at San Francisco, California.

JOHN E. BRYSON
President
VERNON L. STURGEON
RICHARD D. GRAVELLE
LEONARD M. GRIMES JR.
Commissioners

Commissioner Claire T. Dedrick, being necessarily absent, did not participate in the disposition of this proceeding.

EXHIBIT A

Owen L. Gallagher and *Douglas Ring*, Attorneys at Law, for County of Los Angeles; and *Robert A. Munroe* and *O. J. Solander*, Attorneys at Law, for State Department of Transportation; complainants.

Charles W. Burkett and *Carol A. Harris*, Attorneys at Law, for Southern Pacific Transportation Company, defendant.

D. H. Brey, for Brotherhood of Locomotive Engineers; *James P. Jones*, for United Transportation Union, California Legislative Board; and *Eugene C. Given*, for Greyhound Lines, Inc.; intervenors.

William J. Jennings, Attorney at Law, and *Richard C. Collins*, for the Commission staff.

ORDER DENYING MOTION TO DISMISS

By this complaint filed May 18, 1978, County of Los Angeles and State of California Department of Transportation request an order of the Commission directing Southern Pacific Transportation Company (SP) to operate passenger train service between Los Angeles and Oxnard.

On October 6, 1978, SP filed a motion requesting that the complainant be dismissed for lack of jurisdiction to grant the relief sought.

Oral argument on the motion was heard before Administrative Law Judge Daly on November 13, 1978, at San Francisco at which time and place the motion was taken under submission.

Based upon the following jurisdictional facts, which were introduced as Exhibits 1 and 2, SP contends that the Commission is without jurisdiction to require SP to provide a passenger commute service on its Coast Route between Oxnard and Los Angeles:

Exhibit 1

C. H. Howard
Manager, Regional Sales Administration
Southern Pacific Transportation Company

Occupied various positions, including Assistant General Freight and Passenger Agent and Assistant Traffic Manager, in the Passenger Department, Los Angeles Division. All southern

California passenger operations on SP Coast Route between Oxnard and Los Angeles involved intercity trains, and commute passenger trains were never operated between said points. With the passage of the Rail Passenger Service Act of 1970, SP entered into contracts with the National Rail Passenger Corporations (Amtrak). As of that time SP's passenger trains in California were intercity passenger trains with the exception of its peninsula commute trains which operate between San Francisco and San Jose. Exhibit A, attached to Exhibit 1, is a copy of SP's "Cancellation Supplement" issued March 22, 1971, canceling its local, interdivision, and joint passenger tariffs pursuant to the Rail Passenger Service Act of 1970. All local, interdivision, and joint California intrastate tariffs issued by SP as shown in Exhibit A were canceled effective May 1, 1971. SP's participation in joint tariffs issued by the Transcontinental Railroad Passenger Association, the Western Railroad Passenger Association, and the Southwestern Railroad Passenger Association was canceled effective September 1, 1971, for intrastate passenger traffic. By order served April 12, 1972, the Interstate Commerce Commission ordered that all joint passenger tariffs in which SP participated and all individually issued passenger tariffs of SP relating to passenger service terminated under the authority of the Rail Passenger Service Act of 1970 be stricken from its files. As of May 1, 1971, SP has not furnished any rail service between Oxnard and Los Angeles or on any line in the Los Angeles Metropolitan Area. Amtrak presently operates "The Coast Starlight" daily over SP's Coast Route main line to and from Los Angeles Union Passenger Terminal with stops at Oxnard and Glendale. SP has leased to Amtrak its former passenger-related space at all three stations.

Exhibit 2

A. M. Cole

Special Assistant to the Superintendent of the Operating Division,
Los Angeles Division

Was employed by Pacific Electric, a wholly owned subsidiary of SP, which operated an electric interurban railroad service for the commutation of passengers and some freight in the Los Angeles basin from 1911 until its merger into SP in 1965. Pacific Electric never furnished any passenger commutation services between Los Angeles and Glendale or Oxnard over the rail lines of Southern Pacific.

SP argues that when it canceled its tariffs and discontinued all passenger operations in Los Angeles and Ventura Counties, it was no longer a common carrier of passengers in that area, and the Commission lacks jurisdiction to compel it to provide service as requested in the complaint.

SP takes the position that, although it is a common carrier of freight between Los Angeles and Oxnard, it no longer is a common carrier of

passengers between said points; and in the absence of a finding of rededication, the Commission cannot require SP to provide the service requested.

Exhibits 1 and 2 clearly establish that SP was engaged in the transportation of persons and property within the meaning of Article XII, Section 3 of the California Constitution and Section 211(a) of the California Public Utilities Code between Los Angeles and Oxnard until 1971. When SP entered into contracts with Amtrak, it assertedly was relieved of all of its responsibilities as a common carrier of passengers by rail in intercity rail passenger service under Part 1 of the Interstate Commerce Act or any state or other law relating to the provisions of intercity passenger service. Although it emphasizes the fact that its passenger service between Los Angeles and Oxnard was intercity as opposed to commute, it provided no statutory or case authority for the distinction insofar as dedication is concerned.

SP also failed to cite any authority from this Commission to abandon its responsibility and obligation to provide passenger service between Oxnard and Los Angeles, and such prior authorization is required. (*Marin Co. Elec. Rwy.* (1914) 4 CRC 503; *Key System Transit Co.* (1924) 25 CRC 363; and *Lennon et al. v Bayside Lumber Co.* (1916) 10 CRC 116.) In the latter decision the Commission specifically held that:

"If defendant was a common carrier, it could not legally escape its obligations to the public by the simple expedient of leasing its line of railroad and part of its equipment. Furthermore, defendant, if it was a common carrier, could not cease operations as such carrier unless the Railroad Commission's consent had first been secured. No application for such consent was ever made by defendant."

Applications for the discontinuance of specific trains operating between San Francisco and Los Angeles over the Coast Route were granted, but the last train that SP operated over its Coast Route between said points was "The Coast Daylight" and it was discontinued on May 1, 1971, by a tariff filing, as evidenced by Exhibit A attached to Exhibit 1. No application was ever filed with this Commission requesting authority to abandon passenger service.

We are not prepared to say whether the Rail Passenger Service Act of 1970 constitutes a preemption by the federal government of the Commission's jurisdiction to regulate intrastate rail passenger service because of the recent amendment to the California Constitution (Article 3, Section 3¹), which states that a state agency has no power to

¹ "(1) Sec. 3.5 An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

"(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of its being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional.

"(2) To declare a statute unconstitutional.

"(3) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal

declare a statute unenforceable or to refuse to enforce a statute on the basis of preemption by a federal law unless such a determination has been made by an appellate court.

We are unaware of any appellate court determination of this issue and will therefore pursue our constitutional and statutory authority with respect to the regulation of intrastate rail passenger service.

For the above-discussed reasons, the motion to dismiss for lack of jurisdiction will be denied.

IT IS ORDERED that the motion of Southern Pacific Transportation Company to dismiss the complaint filed in this proceeding for lack of jurisdiction is denied.

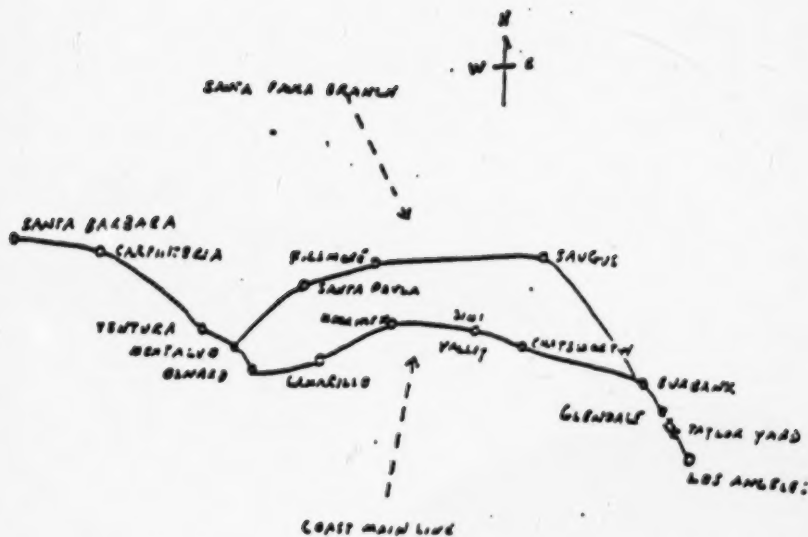
The effective date of this order shall be thirty days after the date hereof.

Dated at San Francisco, California, this 27th day of February, 1979.

JOHN E. BRYSON
President
VERNON L. STURGEON
RICHARD D. GRAVELLE
CLAIRE T. DEDRICK
LEONARD M. GRIMES JR.
Commissioners

law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulation."

APPENDIX A *
Map A
Rail Trackage Routes
Los Angeles-Santa Barbara



Los Angeles-Santa Barbara:

103.2 miles via Coast Main Line

110.2 miles via Santa Paula Branch

* Source: Exhibit 106

APPENDIX B

R. S. Myers and E. J. Foulds, by R. S. Myers, for Applicant.

Don R. Holt, Chief Deputy District Attorney of Ventura County, for Ventura County, Protestant.

F. Mark Durley, for Ventura County Chamber of Commerce, Protestant.

Jack C. Miller, for Oxnard Chamber of Commerce.

R. H. Blanchard, City Attorney, for the City of Santa Paula.

Harry See, for Brotherhood of Railroad Trainmen.

W. H. Glover, for Ventura County Chamber of Commerce, Protestant.

M. H. Cobb, for the City of Fillmore, Protestant.

F. M. Erskine, for Fillmore Chamber of Commerce, Protestant.

G. A. Koechig, for Santa Paula Chamber of Commerce, Protestant.

Fred Pidduck, for Law and Utilities Committee, Ventura Farm Bureau.

BY THE COMMISSION:**OPINION**

In this proceeding, Southern Pacific Company seeks authority to discontinue the operation of its passenger trains numbered 351-352 and 353-354 between Los Angeles and Oxnard. These trains are operated over applicant's main line between Los Angeles and Saugus, over its so-called Santa Paula Branch between Saugus and Montalvo and over its main line between Montalvo and Oxnard.

Public hearings were conducted in this matter by Examiner Gorman at Santa Paula on April 5th and September 19th and at Los Angeles on October 19th, 1954, on the latter date the matter having been duly submitted.

Applicant seeks authority to discontinue the operation of passenger train service between Los Angeles and Oxnard via the Santa Paula Branch and alleges that such authority is sought on account of the fact that the revenue derived from such passenger service is insufficient to meet the out-of-pocket cost of operation; that the financial condition of the company has made it imperative that all reasonable economies be effected; that other passenger common carrier service is being afforded the territory; and that the discontinuance of said service will not constitute an unreasonable inconvenience to the travelling public.

Passenger service, consisting of one round trip daily, is now provided by applicant's motor trains, designated as trains Nos. 351-352 and 353-354, between Los Angeles and Oxnard, a distance of 83.2 miles.

Exhibit No. 4 shows the direct service expense and revenue per annum, applicable to operation of the trains involved herein, which are as follows:

	Total Revenue	Revenue per Car Mile
Passengers	\$4,355.	
Mail	2,008.	
Express	1,195.	
Raggage	45.	
Total	58,461	13.93 ₄
OUT-OF-POCKET OPERATING EXPENSE	Total Cost	Cost per Car Mile
Wages, Engineers & Trainmen	\$8,709.	
Fuel	2,496.	
Motor Car Repairs	5,539.	
Motor Car Supplies & Lubricants	304.	
Train Supplies & Expenses	507.	
Baggage Car Repairs	656.	
Wages, Express Messenger	1,080.	
Total Out-of-Pocket Expense	\$19,291.	31.76 ₄
Out-of-pocket Loss in Operation	\$10,830.	17.83 ₄

The actual out-of-pocket cost of operating said passenger service for 1933 was considerably higher than shown above, since during a part of that period distillate was used as fuel previous to the introduction of the butane gas, which substantially reduced the fuel cost and, in addition, steam trains were used when the motor cars were out of service for repairs. The out-of-pocket cost of operation, as set forth above, is 31.76 cents per car mile; however, the total cost of operation was approximately 52 cents per car mile.

A traffic check (Exhibit No. 9), taken on said trains during the period April 1st, 1933 to March 31st, 1934, shows an average of approximately eight passengers per trip.

Pacific Greyhound Lines, Inc. operates a passenger motor coach service between Los Angeles and Ventura, which practically parallels the route of the rail service proposed to be abandoned and serves all the communities of any consequence now being served by said rail line. A comparison of the rail schedule of trains Nos. 351-352 and 353-354 with that of the Pacific Greyhound is as follows:

Train 351-352		Pacific Greyhound	
		Ventura	
Lv. Oxnard	6:45 A.M.	7:15 A.M.	4:30 P.M.
Lv. Santa Paula	7:18	7:43	4:30
Lv. Fillmore	7:34	8:03	5:10
Lv. Saugus	8:30	9:00	6:07
Ar. Los Angeles	9:38	10:40	7:30
Train 353-354		Pacific Greyhound	
		7:15 A.M.	
Lv. Los Angeles	7:05 P.M.	7:15 A.M.	5:15 P.M.
Lv. Saugus	8:19	9:10	6:55
Lv. Fillmore	9:07	9:57	7:40
Lv. Santa Paula	9:22	10:22	8:02
Ar. Oxnard	9:53 (Ventura)	11:00	9:00

The above tabulation shows that the scheduled time for the bus service is more or less comparable with the rail service. It may be noted that the running time for the rail service between Los Angeles and Santa Paula is two hours and seventeen minutes, while the running time for the bus service between the same points varies from two hours and forty minutes to three hours and seven minutes. At the present time the busses operating through the Santa Paula Valley require a transfer to main line busses at Saugus, involving a layover at said point of from three to thirty-eight minutes.

A witness for Pacific Greyhound testified that during the past few months passenger traffic has shown a substantial increase; that it was hoped that business would continue to increase sufficiently to warrant the operation of through motor coach service between Los Angeles and Oxnard via Santa Paula, as was formerly operated; and that his company is equipped to handle any increased business which may result from the discontinuance of the train service involved herein.

The bus schedules through the Santa Paula Valley are so arranged that practically direct connections are made with both northbound and southbound Southern Pacific main line trains at Ventura or Oxnard.

A representative of Railway Express Agency, Inc. testified that in the event the train service involved herein is abandoned, his company would provide at least an equivalent service at rates identical with existing rates.

Resolutions filed by the Ventura County Chamber of Commerce and Santa Paula Chamber of Commerce protested the granting of this application, on the grounds that the discontinuance of passenger train service through the Santa Paula Valley would result in delay to express and mail service and remove the station of Santa Paula from the passenger railroad time-tables, thereby breaking rail passenger contact with other communities. The protestants who appeared at the hearing presented no evidence in support of the allegation that public convenience and necessity justified the continued operation of said passenger train service.

Protestants also averred that the earnings of the passenger service on the Santa Paula Branch should not be considered independently of the freight earnings (both intra and interstate), derived from the operations of said branch line. This information was introduced in evidence by applicant; however, it does not appear necessary to set forth same, inasmuch as the Commission held in a previous case (Decision No. 28474, dated October 30th, 1933, on Application No. 19000), that the freight earnings were not the determining factor in deciding whether or not passenger service should be continued, as it

did not appear to be in the public interest to require passenger trains to be operated over a line where a substantial out-of-pocket loss is incurred, which must be borne by the carrier or made up through other forms of revenue, if the public can be provided with reasonably adequate and efficient service by other means of transportation.

This application does not in any way involve freight operation or agency service.

After carefully considering the record in this proceeding, it is concluded that this application should be granted. This conclusion is supported by the fact that existing bus lines are able to take care of passengers and baggage and an equivalent express service will be provided. This substitute service, under prevailing conditions, will be reasonably adequate to meet public convenience and necessity.

ORDER

Public hearings having been held in the above entitled proceeding and the matter being now under submission and ready for decision;

IT IS HEREBY ORDERED that Southern Pacific Company be and it is hereby authorized to discontinue operation of its passenger trains numbered 351-352 and 353-354 between Los Angeles and Oxnard via its so-called Santa Paula Branch, subject, however, to the following conditions:

- (1) The public shall be given not less than ten (10) days' advance notice of the proposed discontinuance of passenger service, by posting notices in all passenger trains operated over the Santa Paula Branch and at all stations affected.
- (2) Applicant shall advise this Commission, in writing, within thirty (30) days thereafter, of the discontinuance of the passenger service authorized herein.
- (3) The authorization herein granted shall lapse and become void if not exercised within one (1) year from the date hereof, unless further time is granted by subsequent order.
- (4) Applicant shall make any necessary changes in its tariffs and station lists on not less than five (5) days' notice to the Commission and the public.
- (5) The Commission reserves the right to make such further orders, relative to this matter, as to it may seem right and proper and to revoke the authority granted herein if, in its judgment, public convenience and necessity demand such action.

For all other purposes, the effective date of this order shall be twenty (20) days from the date hereof.

Dated at San Francisco, California, this 22nd day of December, 1934.

LEON O. WHITSELL
W. J. CARR
M. B. HARRIS
WALLACE L. WARE
FRANK R. DEVLIN
Commissioners

Certified as a True Copy

Asst. Secretary, Railroad Commission
State of California

C.10575 L/saw

Decision No. 92230**September 3, 1980****BEFORE THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA**COUNTY OF LOS ANGELES, STATE
OF CALIFORNIA,*Complainants,*

v.

SOUTHERN PACIFIC TRANSPORTATION
COMPANY, a corporation*Defendant.***Case No. 10575****ORDER MODIFYING DECISION NO. 91847,
GRANTING LIMITED REHEARING TO DEFENDANT
AND DENYING REHEARING TO INTERVENOR**

A petition for rehearing of Decision No. 91847 has been filed by Southern Pacific Transportation Company. The County of Los Angeles and the State of California have filed their opposition to the petition for rehearing. A petition for rehearing has also been filed by Greyhound Lines, Inc. We have carefully considered all the allegations of error contained in SP's petition for rehearing and are of the opinion that good cause for granting a limited rehearing of Decision No. 91847 on the terms specified herein has been shown. We have carefully considered all the allegations of error contained in Greyhound's petition for rehearing and are of the opinion that good cause for granting rehearing has not been shown. However, we shall modify our discussion, Findings of Fact and Conclusions of Law to reflect the further study which has been given to this matter upon consideration of the petitions for rehearing. Therefore,

IT IS HEREBY ORDERED that proceedings in Case No. 10575 shall be reopened for the following purposes:

1. Exhibits 114, 115, 116, 117, 118 and 126 shall be admitted into evidence. Complainants shall have the right to cross-examine the witnesses whose prepared testimony is contained therein. Pursuant to Rule 57 of the Commission's Rules of Procedure, Complainants shall also have the right to close the proceedings through presentation of a sur-surrebuttal case. No further exhibits or witnesses shall be submitted or tendered by Defendant.

2. Complainants are hereby directed to present substantial evidence of a reasonable solution to the problem of delays incurred by the afternoon commuter trains due to the arrival of the Amtrak "Coast Starlight." Such evidence may but need not necessarily consist of an agreement with Amtrak for rescheduling the Amtrak train to avoid delays to the afternoon commuter trains.

3. Complainants are hereby directed to present evidence of an agreement with Amtrak regarding servicing and maintenance of the passenger cars.

4. Defendant is hereby put on notice that the Commission stands unimpressed with its insistent efforts to magnify minor operational problems into insurmountable obstacles. The Administrative Law Judge shall have discretion to limit proceedings regarding Exhibits 114-118 and 126 to such major issues of service feasibility as he finds consistent with fairness to all parties.

5. We have carefully reexamined each and every exhibit (nos. 111-126) offered by Greyhound and SP as part of SP's surrebuttal presentation. In view of the modification of Decision No. 91847 which follows, Exhibits 111 and 112 shall not be admitted into evidence. Exhibits 113 and 119-125 shall not be admitted into evidence, as they are argumentative, repetitive and merely cumulative of SP's case in chief and Exhibits 114-118 and 126. Except as specifically granted herein, the petitions to set aside submission are denied.

IT IS FURTHER ORDERED that Decision No. 91847 is modified as specified herein:

1. The discussion appearing in the last paragraph of page 49 and continuing through page 50 and footnote 3 are deleted. In their place are substituted the following eight paragraphs:

"In the meantime, alternate modes of public transportation are necessary, particularly to meet the needs and requirements of commuters between home and work. We do not have the statutory or constitutional authority to determine how subsidy funds available under Senate Bill 620 should be distributed or apportioned. We do not have the authority to decide whether a county, a transit district, or Caltrans should enter into a purchase service contract with Greyhound or with Mr. Nathanael Walter Anderson, Sr., General Manager of GLH Tours, Inc., who testified that this minority-owned charter-party carrier company would be willing to provide a commuter service between Los Angeles and Oxnard if subsidized. However, we do have the authority and the responsibility to consider the evidence presented concerning other alternatives and to evaluate its merits relative to Complainants' proposal.

"We discussed earlier the evidence presented by Greyhound on a bus alternative for the Oxnard-Los Angeles corridor. At the present time, Greyhound is not authorized to serve all of the points along this corridor. Both the Staff and Complainants opposed the introduction of Greyhound's evidence on the ground that Greyhound had not filed a formal application for a certificate of public convenience and necessity for this new service; however, we are of the opinion that it was properly admitted. After thorough review of the direct testimony and cross examination of Greyhound's witness, we conclude that this evidence indicates, at most, the possibility that under certain circumstances not demonstrated to necessarily exist in this case, bus service might be preferable to the proposed train service. However, in the face of the specific proposal which we are called upon to consider

in this case, such tentative conclusions are not sufficiently persuasive to justify our rejection of the primary proposal on the basis that a more viable alternative has been shown to exist.

"In brief, Greyhound's showing has four basic shortcomings. First, it in no sense of the word represents an existing service which could be relied on tomorrow or even next month. We point out that all of our decisions cited by SP to illustrate that we have always considered alternatives, in fact considered *existing* alternatives. Secondly, Greyhound did not even offer a firm proposal of service. When questioned by the ALJ, Greyhound's witness agreed that this 'alternative' was merely a suggestion of a possible service Unts, Greyhound could provide if certain conditions were met, of which governmental subsidy was one of the most important.

"Moreover, Greyhound's witness made assertions about timing, fuel efficiency, and costs which he simply could not support on cross-examination. Nor could he provide specific fuel efficiency figures for the commuter service proposed which were comparable to those developed by the Oak Ridge study. Finally, Greyhound's proposal was shown not to be comparable to that proposed by Complainants. For example, most of the buses leaving Oxnard would go directly to Los Angeles and vice versa; moreover, apparently no one bus would stop at all of the intermediate stops.

"Greyhound's proffered surrebuttal evidence, even if it had been properly offered, does not help Greyhound's case. This evidence, showing (1) the results of three trial bus runs between Oxnard and Los Angeles, and (2) a proposed contract between Greyhound and Los Angeles County giving the specifics of routing and number of buses needed to and from Oxnard, the intermediate stops, and Los Angeles, amounted to a last minute effort to educate an unknowledgeable witness who had been discredited on cross examination. It was therefore of little merit.

"In sum, Greyhound's evidence was fully considered. Greyhound was given every opportunity at the hearings to develop its case; moreover, we thoroughly examined its evidence in the course of making our decision. This evaluation showed Greyhound's proposal to be at best a tentative offer. We could not conclude, on the basis of the showing presented, that a comparable, feasible, and indeed preferable alternative existed.

"It is unclear what Greyhound's motive was in presenting this evidence. We cannot ignore the fact that this complaint was originally filed in May of 1978; had either Greyhound or SP been serious about presenting the Commission with a viable alternative they had plenty of time to do so. It may be that Greyhound is seriously considering seeking the authority to operate buses in this corridor under some type of governmental subsidy, although Greyhound's witness testified that as of the date of the hearing, Greyhound had made no effort to communicate with any local government, with the exception of Simi Valley, about institution of commuter bus service. However, our authorization of the proposed train service does not rule out a complementary service by Greyhound. In fact, Greyhound's witness stated that Greyhound would be willing to provide service complementary to, as well as in lieu of, the train service. We would urge Greyhound to pursue this approach in the appropriate forum.

"In these circumstances, we must decide: (1) whether we have jurisdiction to require SP to provide the proposed commuter service; (2) whether the proposed commuter service is required by public convenience and necessity; and (3) whether a rail service would be feasible under existing conditions."

2. The discussion appearing on page 69, before the commencement of the Findings of Fact, is modified to read:

"Senate Bill 849, Chapter 791 of the Statutes of 1978 (Public Resources Code, Section 21085.5, an urgency measure) provides for the following exemption from CEQA:

'A project for the institution or increase of passenger or commuter service on rail lines already in use, including modernization of existing stations and parking facilities, shall be exempt from this division.'

"In addition, the Commission's Rules of Procedure include categorical exemptions for classes of projects which the Secretary of Natural Resources has exempted from the EIR requirements of CEQA. Interpreting the EIR Guidelines found in Title XIV of the California Administrative Code, Sections 15000 et seq., the Commission has provided that construction of "[a]ccessory (appurtenant) structures to utility structures" is exempt from EIR requirements. (Rule 17.1(h)(1)(C)(3). See Title XIV, Cal. Admin. Code, Section 15103(e).) The type of construction proposed by Caltrans (i.e., open platforms and paved parking areas) falls within this categorical exemption.

"The motion will be denied."

3. New Finding of Fact 34 is added to read:

"Greyhound's evidence on a bus alternative (1) does not represent an existing alternative, (2) is not even a firm proposal, (3) is not supported by first-hand knowledge of its details or its purported benefits, and (4) is not equivalent to the proposal offered by Complainants."

4. Conclusion of Law 12 is modified to read:

"This Commission has no statutory or constitutional authority to determine how subsidy funds available under Senate Bill 620 should be distributed or apportioned. This Commission does not have the authority to decide whether a county, a transit district, or Caltrans should enter into a purchase service contract with Greyhound or other passenger stage or charter party carrier."

5. Conclusion of Law 13 is modified to read:

"Inauguration of a rail commuter service between Los Angeles and Oxnard requires an environmental impact report. Construction of station platforms and parking lot facilities is exempt from the provisions of CEQA."

6. A pre-hearing conference for scheduling these additional proceedings in Case No. 10575 shall be held before Administrative Law Judge Mallory at 10:00 a.m. October 1, 1980 in the Commission's Courtroom, State Building, San Francisco, California 94102.

The effective date of the decision is the date hereof.

Dated September 3, 1980 at San Francisco, California.

JOHN E. BRYSON

President

VERNON I. STURGEON

RICHARD D. GRAVELLE

CLAIRE T. DEDRICK

LEONARD M. GRIMES, JR.

Commissioners

Decision No. 92862**April 7, 1981****BEFORE THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA**

COUNTY OF LOS ANGELES, STATE OF
CALIFORNIA,

Complainants,

vs.

SOUTHERN PACIFIC TRANSPORTATION
COMPANY, a corporation,
Defendant.

Case No. 10575
(Filed
May 18, 1979)

(For appearances see Decision No. 91847.)

ORDER RULING ON MOTIONS

This is a complaint in which the county of Los Angeles (County) and the State Department of Transportation (Caltrans) seek an order of the Commission directing Southern Pacific Transportation Company (SP) to operate a commuter passenger train service between Los Angeles and Oxnard. Decision No. 90018 issued February 27, 1979 denied SP's motion to dismiss on jurisdictional grounds. Decision No. 90417 dated June 5, 1979 denied SP's petition for rehearing of Decision No. 90018.

Following public hearing, the Commission issued Decision No. 91847 on June 30, 1980. Finding 12 of that decision states that based on the evidence adduced on that record, public convenience and necessity require that SP commence passenger train service between Los Angeles Union Passenger Terminal (LAUPT) and Oxnard consisting of two trains daily, each way, between 6:00 and 8:00 a.m. and between 4:00 and 6:00 p.m.,

with intermediate stops at stations or platforms at Camarillo, Moorpark, Santa Susana (Simi Valley), Chatsworth, Northridge, Panorama, Airport, Burbank, and Glendale. The Commission's order in Decision No. 91847 set forth the preliminary steps to be taken by complainants and defendant in order to begin the described commuter service.

SP filed a petition for rehearing of Decision No. 91847.¹ Decision No. 92230 issued September 3, 1980 modified the Discussion, Findings of Fact, and Conclusions of Law set forth in Decision No. 91847 and ordered that Case No. 10575 be reopened for the purpose of receiving additional evidence from SP and complainants as more fully described in that order.

Further hearing, as ordered in Decision No. 92230, was held before Administrative Law Judge John Mallory in San Francisco on October 14 and 15 and November 17 and 18, 1980. The matter was again submitted on the receipt of proposed findings of fact and conclusions of law by complainants, SP, and our staff on December 22, 1980.

County's Motion to Withdraw

Subsequent to submission of the rehearing proceeding, County Supervisor Antonovich advised the Commission by letter that the County Supervisors had voted to rescind County's agreement with Caltrans to provide railcars for the proposed service. On February 19, 1981, County filed a formal motion to withdraw from the proceeding.

County's motion states, in part, as follows:

"On February 5, 1981, the Board of Supervisors of the County of Los Angeles adopted a motion to have the County of Los Angeles withdraw as a Complainant in CPUC Case No. 10575."

* * *

"Co-Complainant State of California has advised Complainant that it has no objection to the granting of this Request."

¹ Greyhound Lines, Inc. also filed a petition for rehearing of Decision No. 91847, which was denied in Decision No. 92230.

County requests an order of the Commission authorizing and directing the withdrawal of County as a complainant in Case No. 10575.

Caltrans has advised this Commission by letter from Adriana Gianturco, its director, and in its response to SP's motion to dismiss (*infra*) that Caltrans intends to comply with the Commission's order in Decision No. 91847, that Caltrans will be responsible for operation of the commuter service, and that it has no objection to County's withdrawal as County is not an essential party to the operation of the service.

SP's Motion to Dismiss

On February 13, 1981, SP filed a motion to dismiss the proceeding, asserting that events since the close of the further hearings have made it clear that no finding of public convenience and necessity warranting the operation of the service can now be made, and that there is no point in continuing to litigate a proceeding which should in all fairness be put to rest.

In support of its motion, SP argues that when this proceeding was instituted both County and Caltrans enthusiastically promoted the concept of commuter rail transportation on SP's largely single track line to Oxnard as the panacea for what was perceived as a public demand for improved commuter transportation from the Simi Valley and other points in Ventura County. SP also asserts that the evidence submitted on behalf of complainants confirms that, while Caltrans may have provided certain technical and other analyses to support the complaint, the popular support, which prompted the Commission to make findings of public convenience and necessity, came not from a state department in Sacramento, but from local government in Los Angeles. That local support is alleged by SP to be determinative of the Commission's findings, as illustrated in the narrative discussion in Decision No. 91847 at mimeo. page 57:

"We also believe that the support for this service from the local public officials, bodies, and organizations is an important element in our determination that the public convenience and necessity require this train service."

SP states that, accordingly, Finding of Fact 9 recited:

"9. Regional and local governmental officials and planning agencies support and encourage commuter rail service in the corridor between Los Angeles and Oxnard."

SP's motion states that the indispensable role of County as the moving force in this complaint is reflected in Ordering Paragraph 5 which provided:

"5. Within 180 days after the effective date hereof SP, CalTrans, and the County of Los Angeles shall negotiate and submit to this Commission for its approval an agreement relating to the equipment and facilities to be used in providing said commuter service and the method to be applied in subsidizing deficits that may result therefrom."

SP's motion further argues that the proposed rail service is fatally flawed and is unworthy of popular support and County's withdrawal is for that reason. SP states former County Supervisor Baxter Ward was the initial proponent of the Oxnard-Los Angeles commuter train plan, and that his defeat by Supervisor Michael D. Antonovich, after the commuter train proposal was placed in issue in the election, was a rejection of the plan by popular vote. SP argues that the rejection of the plan by the electorate and the County Board of Supervisors indicates that there is no longer local government support for the proposal, and that it is apparent that the commuter train proposal, having been rejected by the Board, will play no part in essential regional transit planning.

SP summarizes its arguments as follows:

"1. Local government does not support the commuter train proposal.

"2. Local government's active support is indispensable in any attempt to institute a new service such as that initially proposed here.

"3. With the support of local government withdrawn, there is no longer any assurance that the proposed commuter train services will be integrated into regional transportation planning.

"4. The proposed commuter trains would require massive infusions of public funds. The general scarcity of public funds for transit rationally dictates that such public funding be expended only for services which have the full support of local government, and that State transit experiments should not be imposed upon local communities which do not want them."

Greyhound Lines, Inc.'s Motion to Dismiss

On March 11, 1981, Greyhound Lines, Inc. (Greyhound) filed its motion to dismiss, advancing the same grounds for dismissal as SP. Greyhound's motion also calls to the Commission's attention the filing on January 28, 1981 of its Application No. 60222 in which it seeks authority to operate a bus service between the junction of Interstate Highway 5 and Camarillo, and between Thousand Oaks and Moorpark (the Simi Valley route). Greyhound asserts that the granting of that application would permit it to serve every point in Simi Valley now on the commuter rail route directed to be established in Decision No. 91847. Greyhound submits that it now has on file an unconditional application to serve between Oxnard-Los Angeles and intermediate points. (See Decision No. 92230, in which Greyhound's petition for rehearing was denied; see also, S.F. No. 24244, in which the California Supreme Court denied Greyhound's petition for a writ of review.)

Disposition of County's Motion

County is no longer an indispensable party to this proceeding. Initially, County was to furnish some of the railcars needed for the service. Agreement has now been reached between Caltrans and Amtrak wherein Amtrak will furnish the cars and engines necessary to perform the service and will service and repair that equipment.

The subsidy funding for the proposed service will come entirely from Caltrans; none will be furnished by County. County will not be responsible in any way for the operation of the proposed service. The only essential parties are SP and Caltrans.

Concerning County's request to withdraw, we make the following findings of fact:

1. County would not be responsible for operation of the proposed service under the plan described in our order in Decision No. 91847.

2. County is not required to furnish any cars, engines, or other facilities to operate the proposed service.

3. County is not responsible for any portion of the funding of the proposed service.

The Commission concludes that:

1. County is not an essential party to the proceeding.

2. County's withdrawal from the proceeding will not affect the ability of Caltrans or SP to conduct the proposed service.

3. County's motion to withdraw should be granted.

Disposition of SP's Motion

The thrust of SP's arguments in support of its motion to dismiss is that the proposal for operation of the Oxnard-Los Angeles rail commuter service originated with the County Board of Supervisors (specifically Supervisor Baxter Ward), that our finding of public convenience in Decision No. 91847 is chiefly based on the evidence by or on behalf of County and that withdrawal by County from the proceeding constitutes repudiation of its prior position, which negates the evidence adduced by it supporting our finding of public convenience and necessity.

On February 26, 1981, Caltrans filed its response to SP's motion to dismiss. Caltrans argued that: (1) County is not legally required to be joined in the complaint; therefore, its withdrawal is not grounds for a motion to dismiss; (2) there is substantial evidence in support of the proposed service from regional and local officials and planning agencies other than County; therefore, there is adequate public support from other entities than County; and (3) withdrawal of County does not affect the outcome of Decision No. 91847, as indicated in the rehearing, inasmuch as Caltrans has arranged with Amtrak to provide and maintain the necessary cars and locomotives, Caltrans has the responsibility for establishing the stations, and Caltrans stands ready to negotiate an agreement with SP to subsidize deficits.

On the critical issue of support for the service, Caltrans states:

"SP incorrectly credits Los Angeles County with the 'popular support' of the complaint. The record is clear that the popular support for the service is derived also from a number of citizens and officials in Ventura County as well as citizens and planning agencies of Los Angeles City and County. The critical factor is, moreover, the demand for the service as demonstrated by the ridership projections of Caltrans' witness Mr. Browne. This demand was conservatively estimated when he testified.

"Finding No. 9 is not significantly affected by the withdrawal of Los Angeles County. Indeed, the record still supports the finding that '[r]egional and local governmental officials and planning agencies support and encourage commuter rail service in the corridor between Los Angeles and Oxnard.'"

County's motion states only that the current Board of Supervisors adopted a motion to have County withdraw. The motion does not repudiate any evidence previously adduced by County, nor does the motion state a position in opposition to the proposed service. As indicated above, County is not a necessary party to the proceeding; County need not contribute either railcars or funding to the project. It would be entirely speculative for this Commission, in addition, to attempt to read election results as a popular referendum on the service ordered in Decision No. 91847. We are not persuaded by SP's efforts to have us engage in such speculation.

Concerning SP's motion to dismiss, we make the following findings of fact:

1. There is substantial evidence in the record from regional and local officials and planning agencies on the issue of public convenience and necessity.
2. There is adequate public support from entities other than County to show that the proposed service is needed.
3. Withdrawal of County as a complainant does not affect the establishment of the rail commuter service

ordered in Decision No. 91847, as Caltrans will be solely responsible for the furnishing and maintenance of the operating equipment and station facilities necessary to perform the service.

We make the following conclusions of law:

1. County's withdrawal is not a basis for dismissal of the complaint.
2. Case No. 10575 should not be dismissed for the reasons set forth in SP's motion.
3. Ordering Paragraph 4 of Decision No. 91847 should be amended to delete reference to County.
4. Ordering Paragraph 5 of Decision No. 91847 should be amended to delete reference to County.

Disposition of Greyhound's Motion

Greyhound's motion to dismiss is posited upon the same grounds as SP's motion to dismiss. Accordingly, it will be denied for the same reasons as SP's motion is denied. Examination of Greyhound's Exhibit 3 ("Proposed Simi Valley Service") shows that Greyhound's application to serve Simi Valley provides no basis for dismissal of the complaint. We note, for example, that a bus scheduled to depart from Oxnard (Schedule 6759 revised) at 7:30 a.m.: (a) does not originate there, but appears to be enroute from San Luis Obispo and therefore might be delayed; (b) does not arrive in Los Angeles until 10:00 a.m.; and (c) obviously does not meet typical commuter requirements. The return bus in the afternoon (new schedule) leaves Los Angeles at 4:10 p.m. and arrives in Oxnard at 7:40 p.m. This service too obviously does not meet typical commuter requirements. We do not here prejudge whether Greyhound's application will be granted, but it offers service which is not comparable to Caltrans' rail service.

This order should become effective on the date of issuance in order to expedite consideration of SP's request for a writ of review (SF 24220) now pending before the California Supreme Court.

IT IS ORDERED that:

1. The motions to dismiss Case No. 10575 filed February 13, 1981 by Southern Pacific Transportation Company and March 1, 1981 by Greyhound Lines, Inc. are denied.

2. The County of Los Angeles is authorized to withdraw as a co-complainant in Case No. 10575.

3. Ordering Paragraphs 4 and 5 of Decision No. 91847 are revised to read as follows:

4. Within thirty days prior to the commencement of service by SP, Caltrans shall establish to the Commission's satisfaction that:

- a. Two consists of eight rail passenger cars each are available and ready to be used in service.
- b. Arrangements have been made for the maintenance of rail cars and for the sale of tickets.
- c. An escrow account has been established containing deposits of \$1.3 million for the purpose of constructing station platforms and parking facilities and a deposit of at least one-half of the estimated cost of first-year operations as set forth in Exhibit 9.

5. Within one hundred eighty days after the effective date hereof SP and Caltrans shall negotiate and submit to this Commission for its approval an agreement relating to the equipment and facilities to be used in providing said commuter service and the method to be applied in subsidizing deficits that may result therefrom.

The effective date of this order is the date hereof.

Dated April 7, 1981, at San Francisco, California.

JOHN E. BRYSON

President

RICHARD D. GRAVELLE

LEONARD M. GRIMES, JR.

VICTOR CALVO

PRISCILLA C. GREW

Commissioners

**DECISION NO. 92863, CASE NO. 10575
(April 7, 1981)**

In complaint of *County of Los Angeles and State of California v. SoPac Transp. Co.* regarding Oxnard-Los Angeles commuter train service, D91847 and D92364 amended with respect to findings concerning feasibility of service.

- [1] **RAILROADS** However, if additional freight or Amtrak service burdens the line, improvements in yards, sidings, and traffic controls probably will be necessary, even in the absence of commuter service.

(For appearances see Decision No. 91847.)

OPINION FOLLOWING LIMITED REHEARING

This is a complaint in which the County of Los Angeles (County) and the State Department of Transportation (Caltrans) seek an order of the Commission directing Southern Pacific Transportation Company (SP) to operate a commuter passenger train service between Los Angeles and Oxnard.¹ Decision No. 90018 issued February 27, 1979 denied SP's motion to dismiss on jurisdictional grounds. Decision No. 90417 dated June 5, 1979 denied SP's petition for rehearing of Decision No. 90018.

Following public hearing, the Commission issued Decision No. 91847 on June 30, 1980. That decision ordered as follows:

1. Within thirty days after the effective date hereof, the State of California Department of Transportation (Caltrans) shall submit to Southern Pacific Transportation Company (SP) and file with this Commission locations, plans, and specifications for station platforms and parking facilities.
2. Within ninety days after receipt of the plans and specifications provided for in Ordering Paragraph 1 hereof, SP shall construct the platforms and parking facilities in accordance with said plans and specifications and shall, upon ten days' notice to the Commission and the public, commence operations of two commuter passenger trains between Los Angeles and Oxnard with intermediate stops at Camarillo, Moorpark, Santa Susana (Simi Valley), Chatsworth, Northridge, Panorama, Airport, Burbank, and Glendale. Said service shall be provided subject to the condition that Caltrans shall subsidize deficits resulting from such operation.
3. SP shall operate the rail service provided for in Ordering Paragraph 2 hereof between the hours of 6 a.m. and 8 a.m. and between 4 p.m. and 6 p.m. daily, Monday through Friday, holidays excepted.
4. Within thirty days prior to the commencement of service by SP, complainants shall establish to the Commission's satisfaction that:
 - a. Two consists of eight rail passenger cars each are available and ready to be used in service.
 - b. Arrangements have been made for the maintenance of rail cars and for the sale of tickets.

¹ By Decision No. 90018 issued April 7, 1981, the County of Los Angeles was dismissed as a complainant.

- c. An escrow account has been established containing deposits of \$1.3 million for the purpose of constructing station platforms and parking facilities and a deposit of at least one-half of the estimated cost of first-year operations as set forth in Exhibit 9.
5. Within one hundred eighty days after the effective date hereof SP, Caltrans, and the County of Los Angeles shall negotiate and submit to this Commission for its approval an agreement relating to the equipment and facilities to be used in providing said commuter service and the method to be applied in subsidizing deficits that may result therefrom.
6. During the period of negotiations funds deposited in the escrow account provided for in Ordering Paragraph 4(c) hereof, shall be used for the purpose of inaugurating and maintaining the commuter service. When an agreement has been reached and actual costs have been determined adjustments will be made accordingly.
7. Within sixty days after the effective date hereof, and on not less than ten days' notice to the Commission and to the public, SP shall amend its tariffs and timetables on file with the Commission to reflect the service herein authorized and ordered.
8. The petition for a proposed report as well as the motions to set aside submission for the receiving of surrebuttal evidence and the motion for a protective order that a "HY-Rail" tour need not be provided are denied.

SP filed a petition for rehearing of Decision No. 91847.³ Decision No. 92230 issued September 3, 1980 modified the discussion, Findings of Fact, and Conclusions of law set forth in Decision No. 91847 and ordered that Case No. 10575 be reopened for the following purposes:

1. Exhibits 114, 115, 116, 117, 118 and 126 shall be admitted into evidence. Complainants shall have the right to cross-examine the witnesses whose prepared testimony is contained therein. Pursuant to Rule 57 of the Commission's Rules of Procedure, complainants shall also have the right to close the proceedings through presentation of a sur-surrebuttal case. No further exhibits or witnesses shall be submitted or tendered by defendant.
2. Complainants are hereby directed to present substantial evidence of a reasonable solution to the problem of delays incurred by the afternoon commuter trains due to the arrival of the Amtrak "Coast Starlight". such evidence may, but need not necessarily, consist of an agreement with Amtrak for rescheduling the Amtrak train to avoid delays to the afternoon commuter trains.
3. Complainants are hereby directed to present evidence of an agreement with Amtrak regarding servicing and maintenance of the passenger cars.

³ Greyhound Lines, Inc. also filed a petition for rehearing of Decision No. 91847, which was denied in Decision No. 92230.

4. Defendant is hereby put on notice that the Commission stands unimpressed with its insistent efforts to magnify minor operational problems into insurmountable obstacles. The Administrative Law Judge shall have discretion to limit proceedings regarding Exhibits 114-118 and 126 to such major issues of service feasibility as he finds consistent with fairness to all parties.
5. We have carefully reexamined each and every exhibit (Nos. 111-126) offered by Greyhound and SP as part of SP's surrebuttal presentation. In view of the modification of Decision No. 91847 which follows, Exhibits 111 and 112 shall not be admitted into evidence. Exhibits 113 and 119-125 shall not be admitted into evidence, as they are argumentative, repetitive, and merely cumulative of SP's case in chief and Exhibits 114-118 and 126. Except as specifically granted herein, the petitions to set aside submission are denied.

Following a prehearing conference on October 7, 1980, at which the order of presentation of evidence and hearing dates were determined, further hearing, as ordered in Decision No. 92230, was held before Administrative Law Judge Mallory in San Francisco on October 14 and 15 and November 17 and 18, 1980. The matter was again submitted on the receipt of proposed findings of fact and conclusions of law by complainant, defendant, and our staff on December 22, 1980.

Background

The service proposed by Caltrans is the operation of two commuter passenger trains during the morning from Oxnard to Los Angeles, and two passenger trains from Los Angeles to Oxnard in the evening, five days weekly (Monday through Friday). SP's Oxnard-Los Angeles line is a part of SP's coast main line. It is a single track for the greater portion of its length. Amtrak operates passenger service over that route, and its operations southbound (eastbound) in the evening will coincide with the northbound (westbound) commuter train operations. SP operates local and interdivision freight trains over the route. Two major freight yards (GEMCO and Taylor) are located on the route. At times the Oxnard-Los Angeles main line adjacent to those yards is used in making up freight trains. That use would need to be discontinued during the period that commuter trains operate, as would the use of the main line for freight train movements.

It is SP's contention throughout this proceeding that the commuter train operations will usurp its Oxnard-Los Angeles main line to such an extent that its freight train operations will be seriously impeded and that the operation of two first-class passenger trains in opposite directions, at the same time, on the single-track line, will result in safety hazards and operational problems.

SP's Exhibits 114-118, and 126 contain surrebuttal testimony address-

ing the asserted operational, scheduling, and safety problems described in the preceding paragraph.

Sur-surrebuttal testimony was presented by complainant, which consisted of five exhibits, including the prepared testimony of Witness Brophy (Exhibit 134), an Agreement of Intent between Caltrans and Amtrak (Exhibit 135), an amended schedule for evening commuter trains designed to reduce conflicts with Amtrak trains (Exhibit 136), a further amended schedule for evening commuter trains (Exhibit 137), and a letter from Amtrak indicating its willingness to maintain the El Camino-type cars of County (Exhibit 143).

Proposed findings of fact and conclusions of law were submitted by complainant, defendant and our staff. The findings and conclusions in Decision No. 91847 and the parties' proposed or new amended findings and conclusions are discussed below.

In Decision No. 91847 we decided three broad categories of issues: (1) whether we have jurisdiction to require SP to provide the proposed commuter service; (2) whether the proposed commuter service is required by public convenience and necessity; and (3) whether a rail service would be feasible under existing conditions.

Categories (1) and (2) are not in issue in the reopened proceeding. Findings 1 through 14 of Decision No. 91847 deal with the issues of jurisdiction (Category 1) and public convenience and necessity (Category 2). Findings 15 through 33 deal with the issue of whether a rail passenger service would be feasible under existing conditions; these are the matters on which further evidence was presented.

No changes were proposed in Findings 1 through 11 by any of the parties. Proposed Findings 12 and 14 of the staff iterate the current findings concerning public convenience and necessity and the need of complainant and defendant to engage in negotiations leading to an agreement to render the service. Those findings were not in issue in the limited rehearing. No further discussion or changes in Findings 12 and 14 are necessary.

Defendant's Surrebuttal Showing

SP's position is that the key findings of Decision No. 91847 dealing with operations of commuter and freight services were based on the surrebuttal testimony of complainant's witnesses Brophy and King, to which SP did not have an opportunity to respond.³ The rehearing granted in Decision No. 92230 permitted SP to present surrebuttal exhibits responding to complainant's rebuttal showing.

³ Findings 13, 16, 18, 19, 21, and 25 of Decision No. 91847 are the key findings which collectively state (a) that the proposed commuter trains can be operated with no significant adverse effect upon SP's freight service, (b) that certain changes in yard and siding facilities should be made in the interests of improving efficiency, (c) that if these were done, any operational problems could be resolved, and (d) that the passenger cars proposed by complainant are in excellent condition and more than adequate for the proposed service.

Exhibit 114, Witness Giles

The witness identified in his exhibit a number of problems which he believes would prevent the successful operation of the commuter service, as follows:

1. Passenger train operations off the main line for extended periods of time during which operating personnel would be idle.
2. Less time would be available for freight train crews to complete their work.
3. There is a lack of sufficient track space at Oxnard to store two commuter trains overnight.
4. There are no facilities at Oxnard for cleaning and servicing commuter equipment.
5. There will be difficulty replacing temporarily all crew members at Oxnard.
6. There is an absence of parking facilities at Oxnard for crew and servicing personnel.
7. SP does not have experienced supervisory personnel to operate a commuter service on the Oxnard-Los Angeles segment.
8. SP will encounter scheduling difficulties if Oxnard is used as a crew base instead of Los Angeles.

Exhibit 115, Witness Baumhefner

The witness explained freight train operating difficulties that he perceived would result if commuter service is operated. He pointed out specific points of disagreement with the testimony of complainant's principal operating witness, Mr. Brophy.

Witness Baumhefner concluded there is no way to operate GEMCO Yard other than the way it was operated during the fall of 1979. The operation of the commuter trains would interfere with the makeup of the outbound automobile trains, the delivery of "hot" auto parts cars to GEMCO, and the operation of local and through freights in the GEMCO Yard vicinity. Witness Baumhefner also sees the need for additional lighting and/or parking facilities at several locations.

Exhibit 116, Witness Thruston

Witness Thruston testified that freight volumes on the Coast Line are increasing and expected to continue to grow and that there is no possible way to handle the proposed commuter trains in conjunction with the existing freight traffic on the line. He also stated that traffic levels at Taylor Yard have not been reduced to any measurable extent by the opening of West Colton Yard although it has reduced some of the traffic in the satellite

yards and to and from the satellite yards. Witness Thruston further testified that SP does not have any steam generator locomotives suitable for use in the proposed commuter service and to equip all of SP's freight fleet with steam generator equipment would cost in excess of \$50,000,000. Operation of the commuter trains would, in Witness Thruston's opinion impair the ability of SP to adequately maintain its present level of Amtrak and freight services.

Exhibit 117, Witness Garrett

Witness Garrett states that he disagrees with the testimony and conclusions of complainant's Witness Brophy because Brophy viewed Taylor Yard at a time of reduced activity. He further states that yarding through trains for crew changes would not increase the flexibility of Taylor Yard. The witness foresees problems in operating the proposed passenger trains past Mission Tower. Witness Garrett states that Brophy identified only one-fourth of the conflicting movements that will be caused by the operation of the passenger trains. Industrial switching between Taylor Yard and Burbank Junction on the double-track segment will be interfered with by the operation of the commuter trains to a greater extent than Brophy anticipates because contrary to Brophy's assumption, the local switchers cannot cross from one double-track segment to the other to clear the passenger trains.

Exhibit 118, Witness Owen

Witness Owen determined that the proposed schedule for the commuter trains set forth in Decision No. 91847 is unworkable and calculated that a reasonable schedule would be 120 minutes eastbound and 128 minutes westbound. Witness Owen further testified that he performed an analysis of the interference that the passenger trains would cause with SP's existing freight operations and that in so doing he adjusted existing schedules and services to create the best fit, minimizing the impact of the passenger trains. He constructed what he considered to be a typical day's operation on the railroad and the typical interference to freight operations that would arise from the creation of the proposed commuter trains. Witness Owen conducted a further analysis involving expected interference with Amtrak's Train No. 12 and the afternoon commuter trains. He believes that the operation of the afternoon commuter trains would have a substantial adverse effect on the performance of Amtrak Train No. 12. He projects that 50 percent of the Amtrak trains will be

delayed an average of 15 minutes per trip as a result of the operation of the commuter trains. In addition to the initial interference and delays identified, there would be secondary delays which could be expected to occur due to the lack of flexibility in the existing SP plant. Moreover, Amtrak has plans to expand passenger service on this line thus increasing the anticipated congestion.

The witness testified that if there were additional traffic on the line and increased congestion this could adversely affect the operation of the commuter trains. Witness Owen disagrees with Witness Brophy's conclusion that the introduction of additional passenger trains would strengthen SP's operation by requiring the imposition of more stringent operating practices on the line.

Exhibit 128. Witness Jochner

Witness Jochner anticipated that the proposed commuter coaches will be inappropriate because: (1) the vestibule doors present operational problems; (2) the heating and cooling systems may be difficult to maintain; (3) some of the equipment may not have ticket clips; (4) the food service cars may be inappropriate for commuter services; (5) the seat configuration may not be optimal; and (6) there may be problems with cleaning and maintaining the equipment. Also, there will be problems arising from inadequate station shelters, information systems at stations, and ticket selling by banks.

The witness also predicted the loss of incentive payments by Amtrak to SP if commuter trains create substantial delays to Amtrak trains.

Complainant's Sur-surrebuttal Evidence

Complainant's sur-surrebuttal evidence consists of five exhibits: (a) the verified statement of Witness Brophy (Exhibit 134); (b) an "Agreement of Intent" between Caltrans and Amtrak (Exhibit 135); (c) a motion requesting a revised schedule for the afternoon commuter trains (Exhibit 137); and (d) a letter from Amtrak indicating a willingness to maintain the El Camino Cars (Exhibit 143).

Exhibit 138. Witness Brophy

Witness Brophy addressed various specific issues in response to the decision granting rehearing and to the specific evidence presented in SP's surrebuttal. Witness Brophy noted that the calculations by SP's Witness Owen of the proposed commuter schedules are suspect because Owen used an incorrect weight for the trains, made no study of station dwell times, and failed to address the passenger-freight train

conflict so as to mesh the operations and eliminate the problems. The witness testified that the modified schedule requested by complainant purportedly eliminates the conflict problem with Amtrak Train No. 12 and simultaneously eliminates the additional eight-minute delay to the commuter trains assigned by SP Witness Owen.

Witness Brophy examined facilities at Oxnard and found ample track space available for the storage of the commuter equipment overnight at that location. His inspection showed that there was an electric cable laid immediately alongside the House Track No. 4104 and that there was a track at Oxnard where locomotives could be fueled and serviced. In response to SP's concern that there would be a problem with crewmen for the commuter trains suddenly taking ill with no replacements available at Oxnard, the witness' investigation showed that during September 1980, for the two assignments worked in Oxnard, there were only six days out of the 30 in the month when an individual trainman had to be replaced at Oxnard and in all cases the trainman had laid off at least eight hours prior to his next scheduled duty time. The same was true for engineers. The witness concluded that the records showed there was no problem with Oxnard crews suddenly taking ill (Exhibit 134 pp. 8-9). He also pointed out that supervisory personnel could be used in the unlikely event a crew member became suddenly ill.

Witness Brophy examined the rail operations at GEMCO Yard and Taylor Yard on four separate occasions in September and October 1979 and April and October 1980. On none of these occasions have these yards been operating at capacity.

Witness Brophy believes that operation of the proposed commuter service could be accomplished with virtually no impact on existing freight operations simply by modifying existing freight operating practices so as to keep the main line clear for the passenger operation. He determined that the window required for the passenger operation would be 33 minutes in the morning and 45 minutes in the afternoon. He pointed out that the difference between his count of conflicting train movements at Taylor Yard and that of SP's Witness Garrett, is that Garrett counted light engine moves as well as actual train movements. He noted that SP's concern about local freight crews working overtime due to interference from the proposed passenger trains could be alleviated by simply adjusting the duty time of the local switchers.

The witness concluded that the passenger trains can be accommodated in the same manner that seasonal increases in freight traffic are accommodated.

Agreement of Intent, Exhibit 135

This agreement between Amtrak and Caltrans commits Amtrak to

lease to Caltrans up to 16 rail-passenger cars for use in the proposed commuter service. It also gives Caltrans the right to lease up to five SDP40 locomotives for the proposed service. Amtrak agrees to maintain the equipment which Caltrans uses in this service including the El Camino cars. Amtrak and Caltrans agree to joint usage of the station facilities at LAUPT, Glendale, and Oxnard. Amtrak will provide such additional personnel as may be required to provide these functions for Caltrans.

Schedule Modifications, Exhibits 136 and 137

The schedule requested by complainant in Exhibit 136, as modified by Exhibit 137, assertedly alleviates the conflict with Amtrak Train No. 12 and the afternoon commuter train schedules by establishing positive meets for these trains, using the standard procedure for meeting passenger trains throughout the country for the past 100 years.

Discussion

The Commission's order granting rehearing limited the scope of the evidence to be received on rehearing to certain specific issues. SP was permitted to introduce testimony of its operating witnesses addressing specific operating problems. Complainant responded to that evidence. Complainant also was directed to present evidence of an ability to resolve certain expected requirements for the service. This discussion will focus on those specific issues.

The thrust of SP's surrebuttal testimony was directed to the problems associated with the imposition of the new commuter train operating on top of the existing freight train operations.

It is SP's overriding contention that it cannot rearrange its freight operations to accommodate the proposed commuter train operations without causing long periods of delays and disruptions to its freight service. SP also strongly contends that westbound evening commuter operations will conflict with the eastbound Amtrak operations; that Amtrak service should take precedence over the commuter service; and that serious delays to either the Amtrak service or the commuter service will occur, depending on which is the primary service.

Of far lesser importance are the many relatively minor operational problems described by SP in its surrebuttal testimony. Those problems appear to be readily solved with the cooperation of SP and with minor changes in the operational plans proposed by complainant.

Interference with Freight Service

SP attempted to disprove the rebuttal testimony of complainant's principal operating witness relied upon by the Commission in Decision No. 91847. SP attempted to rehabilitate its interference studies which

assertedly showed that serious interference with its freight operations would result from the operations of the commuter trains; that its yard operations are efficient and that at various times its main line must be used to make up freight trains; and that the interference would impose added costs upon SP and would inconvenience its freight shippers. Much of such testimony iterated or amplified testimony described in and considered in Decision No. 91847.

There are major disagreements between SP and complainant with respect to the time windows during which freight train operations on the main line must close while commuter operations are performed. Complainant's witness estimates a window of 33 minutes in the morning and 45 minutes in the evening. SP's witness estimates a window of 2 hours in the morning and 2 hours in the evening. The estimates of delays to "hot" cars of auto parts, to through freight trains, and extra crew salaries and car-delay costs are related to these windows.

Some delays to freight service inevitably will occur, as measured by either window. We do not accept SP's window because we believe that its estimate is based on a "worst case" analysis, wherein little effort would be made to adjust freight operations to accommodate commuter operations. On the other hand, complainant's window presents the best possible case, and ignores some of the operational problems described in SP's testimony. A thorough review of the evidence again convinces us that, on balance, the present Oxnard-Los Angeles line is adequate to accommodate the commuter service and SP's existing freight service.

[1] However, if additional freight or Amtrak service burdens the line, improvements in yards, sidings, and traffic controls probably will be necessary, even in the absence of commuter service. Finding 30 of our original decision stated that SP should not be reimbursed for delays to its freight operations. We reiterate that finding, while keeping in mind the import of the discussion on page 65 (mimeo.) of Decision No. 91847 on which Finding 30 is based. We recognize that other possible steps should now be explored to minimize delays which cannot be eliminated by reasonable operating changes or innovations. The corrective actions which may need to be taken are to: (a) double-track the single-track portion of the Oxnard-Los Angeles line; (b) install centralized traffic control (CTC); and (c) install additional side tracks, improve yard facilities, or lengthen existing side tracks.

The high cost of double-tracking the line makes it an unacceptable solution to the problem. It should only be considered as a last resort.

Installing CTC, while expensive, is less costly than double-tracking. CTC not only would help reduce delays to freight operations, but would

materially reduce the problems associated with timetable meets of Amtrak and commuter trains as hereinafter discussed. We are not prepared to direct installation of CTC at this time. We wish to review the performance of commuter and freight services for a reasonable time under actual operating conditions. If, after a reasonable period of operations, circumstances disclose that CTC may be essential, we will consider that issue in a subsequent proceeding.

In the absence of CTC or double-tracking, additional side tracks may need to be installed or made available to minimize delays to freight trains and to ease the problems of meets between Amtrak and commuter trains. An additional side track may need to be made available as indicated in Finding 16 (Hewitt siding). Other sidings may need to be constructed along the single-track portion of the line to permit the passing of the commuter and the Amtrak trains without unnecessarily delaying either. We will not now order construction of new sidings at specific locations as a contingency to beginning the commuter operations, but will consider the issue at a later time after actual commuter operations have begun, if reasonable operational changes and innovations do not alleviate interference or delays.

Finding 16 refers to side tracks and to the use of radio to facilitate meets between commuter trains and inferior trains. The record shows that the use of radio to issue train orders is not a practical solution for minimizing delays. Finding of Fact 16 should be amended to read as follows:

16. A major portion of the SP coastline track facilities between Los Angeles and Oxnard is single track with side tracks at four locations. Additional side tracks would greatly facilitate the movement of commuter trains and minimize delays to both passenger and freight trains. Hewitt siding should be returned to operation. Hewitt siding is not required to maintain fluid operations at GEMCO Yard. The use of radio to issue train orders is not a practical solution for minimizing delays to inferior trains.

Based on the foregoing discussion, we will modify Finding of Fact 17 to read as follows:

17. SJ's interference study is a "worst case" analysis of the train conflicts which would result if the proposed commuter service is authorized. It shows a two-hour window in the morning and evening during which time freight operations must cease on the main line while the commuter trains operate. Complainant's similar analysis presents the most favorable possible operations, and ignores some of the inevitable conflicts which will arise. Complainant's study shows a thirty-three minute window in the morning and a forty-five minute window in the evening when freight trains must cease operations on the main line

because of the commuter operations. Under either analysis, some delays to freight service will occur, but, on balance, the existing line is capable of accommodating both the commuter service and freight service.

The record in the rehearing phase shows that activity at GEMCO has declined because of the reduction in traffic at the General Motors plant as a result of slowing of the sale of new automobiles. The record also shows that the makeup and storage of freight trains adjacent to GEMCO Yard can be accomplished by extending an auxiliary track within GEMCO to accommodate freight trains two miles in length. The main line would clear and would not be used for that purpose. Finding of Fact 18 should be modified to reflect these changes, as follows:

18. SP's GEMCO and Taylor Yards pose a potential problem for conflicts with the proposed commuter trains, but a major contributing factor is SP's practice of making up trains on the main tracks adjacent to both yards. Traffic has decreased at GEMCO Yard in the period between the initial hearing and the date of rehearing because of reduction of traffic at the General Motors plant. Better utilization of GEMCO Yard facilities and less interference with the main line operations can be achieved by construction of a two-mile-long ancillary track within GEMCO Yard. More efficient yard operations, and stricter discipline in the calling and operation of freight trains would minimize possible delays to passenger and freight trains because of conflicts.

Schedule Conflict with Amtrak Train No. 12

The Commission's order granting rehearing directed complainant to present substantial evidence of a reasonable solution to the problems of delays incurred by the afternoon commuter trains due to the arrival of the Amtrak "Coast Starlight".⁴

Complainant attempted to meet that directive by revising the west-bound commuter schedules (Exhibit 139) so that the first evening train (No. 301) meets Amtrak No. 12 at Moorpark and the second train (No. 303) meets Amtrak No. 2 at Santa Susana. In order to facilitate timetable meets, complainant suggests that Amtrak No. 12's schedule be revised between Oxnard and Los Angeles (there would be no change at Oxnard or Los Angeles).

In its testimony, SP disputed the ability of the commuter trains to meet the schedules proposed by complainant. SP's evidence was designed to show that actual station dwell times are greater than those incorporated into complainant's schedule, and that serious delays will occur when Amtrak No. 12 is late or early and scheduled meets cannot take place. SP's estimate of station dwell times assertedly takes into

⁴ Ordering Paragraph 2 of Decision No. 92830

consideration its experience operating commuter trains on the San Francisco peninsula, the difficulties in boarding or alighting from the Amtrak cars which have narrow doors and steps at other than platform heights, and the need for brakemen to manually open and close car doors. SP compared the rapid operation of automatic center double doors on its bilevel cars used on its peninsula operations with the manually operated doors at either end of the Amtrak cars.

The greatest problem foreseen by SP concerns the delays resulting when Amtrak No. 12 is not on time. SP presented evidence to show that the time schedule for that train provides extra time in the last leg of its run from Oxnard to Los Angeles to make up for earlier delays. SP showed that Amtrak No. 12 was late at Oxnard 60 percent of the time, and that even with the added schedule time, that train was also often late at Los Angeles.

SP assumed that Amtrak No. 12 would take precedence over the commuter trains, and that the commuter trains would be sidetracked if timetable meets cannot be accomplished. SP points out that there are a limited number of sidings available for the commuter train to use while it waits for Amtrak No. 12 to clear. SP also pointed out it is penalized under its contract with Amtrak for late operations. It argued that because of that penalty provision it must give precedence to the Amtrak train over the commuter trains.

It is complainant's position that when two first-class trains are involved (such as here) the westbound train takes precedence over the eastbound train under standard railroad operating rules. Therefore, under the operating rules, Amtrak No. 12 should be sidetracked rather than the commuter trains whenever timetable meets cannot be accomplished.

It is not our purpose to resolve in this order which train has precedence in the event of a failed timetable meet. However, we recognize that Amtrak No. 12 has had a very poor on-time performance, which makes it probable that scheduled timetable meets of Amtrak No. 12 and the commuter trains will be the exception rather than the rule. We also recognize that there are limited side tracks available in the area between Chatsworth and Oxnard where the delays will occur. We have discussed above the fact that CTC could mitigate some of the freight train delays. Installation of an interlock CTC system between Chatsworth and Oxnard would materially facilitate the meets of the two first-class trains. As heretofore indicated, we will explore whether CTC or additional sidings are needed based on the experience gained through actual operations. Preliminary to that review we expect SP and Caltrans to make schedule adjustments during the initial period of operations that will reduce delays to the maximum degree possible.

Based on the foregoing discussion, Finding of Fact 19 should be revised to read as follows:

19. The proposed rail commuter service is feasible. Initially certain operational problems will be experienced but these can and should be resolved following a reasonable period for operational and public adjustment. After that adjustment period we will review the operational problems with a view to ordering CTC, new sidings, or other means of avoiding conflicts, should those measures be needed.

Locomotives

Finding 20 of Decision No. 91847 provides that SP shall furnish locomotives to operate the commuter service. Subparagraphs (a) and (b) of Ordering Paragraph 4 require Caltrans to establish to the Commission's satisfaction that it has sufficient passenger cars to provide the service and that arrangements have been made for equipment maintenance and ticket sales. Caltrans and Amtrak have reached an agreement that Amtrak will supply the passenger cars and locomotives necessary to provide the proposed service and that Amtrak will maintain and service that equipment. Amtrak also will handle ticket sales for Caltrans.

Finding of Fact 20 should be amended to read as follows:

20. Caltrans has established to the Commission's satisfaction that:
 - a. It has two consists of eight rail passenger cars and sufficient locomotives available and ready to be used in the proposed service;
 - b. Arrangements have been made for the maintenance of passenger cars and locomotives and for sale of tickets.

Ordering Paragraphs 4(a) and 4(b) of Decision No. 91847 have been complied with and should be deleted.

Finding 25 should be deleted inasmuch as it is moot since Amtrak has agreed to furnish the passenger cars to be used in the proposed service.

Commuter Operating Schedule

SP challenges the 1-hour and 30-minute schedules proposed by Caltrans. SP asserts that at least 2 hours eastbound, 2 hours and 8 minutes westbound must be allowed for a realistic schedule for commuter trains. SP bases this on its contention that additional time is necessary on its estimates that station dwell time is understated, and that insufficient time is allowed for acceleration and deceleration of the heavy conventional rail equipment. SP states that the low-density single-vestibule cars will require more time for loading and unloading. The SP witness would increase station dwell times at low-volume stations by one-half minute and by two minutes at high-volume stations. The witness also

made an extra allowance of 3 minutes per schedule for sawing by non-clearing freight trains. He also added a standard 5 percent recovery for ordering random delays. Eight additional minutes were added to the westbound schedule to allow for meeting Amtrak.

As indicated in the testimony of the witnesses for Caltrans and SP, the schedule times proposed by them are based on their informed judgment. Caltrans' witness presented a schedule that reflects the most optimistic operating conditions. SP's assumptions are that delays will be encountered daily, and those delays are built into its schedule. Again, only after actual operations are commenced and some experience is gained can an accurate and realistic schedule be developed.

Delays can and will be minimized through timetable meets of the commuter trains and Amtrak No. 12. Finding 35 should be added to clearly indicate to the parties that it is essential that commuter-train schedule adjustments be made as often as necessary in order to facilitate timetable meets of the commuter trains with Amtrak No. 12.

35. The adjustment of the afternoon commuter schedules to create timetable meets with Amtrak Train No. 12 will minimize delays.

Service of Equipment and Crew Assignments at Oxnard

SP contends that it has no facilities at Oxnard at which to store or service the two commuter trains, nor any personnel at Oxnard to service the trains. SP also contends that as its nearest extra board for engineers, conductors, and brakemen is located at Los Angeles, it will have difficulty supplying temporary crew replacements on morning runs from Oxnard.

Caltrans urges that certain tracks at Oxnard that are not now in use or are seldom used can be made available by SP; that electricity and water are now available at such tracks or can be made easily available; and that crew replacements can be supplied from Los Angeles with sufficient lead time, or supervisory personnel can fill in as needed.

Again, it appears that these problems are not insurmountable and need only to be worked out between SP and Caltrans. These are relatively minor operational problems and the feasibility of the commuter operations is not contingent upon their immediate resolution. We direct SP and Caltrans to engage in good faith negotiations to arrive at solutions to those problems which are equitable to both. No changes in our other findings are required.

ORDER FOLLOWING LIMITED REHEARING

IT IS ORDERED that Decisions Nos. 91847, 92364, and the decision concurrently issued in this proceeding are modified as follows:

1. Finding 16 is modified to read as follows:

16. A major portion of the SP coast line track facilities between Los Angeles and Oxnard is a single track with side tracks at four locations. Additional side tracks would greatly facilitate the movement of commuter trains and minimize delays to both passenger and freight trains. Hewitt siding should be returned to operation. Hewitt siding is not required to maintain fluid operations at GEMCO Yard. The use of radio to issue train orders is not a practical solution for minimizing delays to inferior trains.
2. Finding 17 is modified to read as follows:
 17. SP's interference study is a "worst case" analysis of the train conflicts which would result if the proposed commuter service is authorized. It shows a two-hour window in the morning and evening during which time freight operations must cease on the main line while the commuter trains operate. Complainant's similar analysis presents the most favorable possible operations, and ignores some of the inevitable conflicts which will arise. Complainant's study shows a thirty-three minute window in the morning and a forty-five minute window in the evening when freight trains must cease operations on the main line because of the commuter operations. Under either analysis, some delays to freight service will occur, but, on balance, the existing line is capable of accommodating both the commuter service and freight service.
3. Finding 18 is modified to read as follows:
 18. SP's GEMCO and Taylor Yards pose a potential problem for conflicts with the proposed commuter trains, but a major contributing factor is SP's practice of making up trains on the main tracks adjacent to both yards. Traffic has decreased at GEMCO Yard in the period between the initial hearing and the date of rehearing because of reduction of traffic at the General Motors plant. Better utilization of GEMCO Yard facilities and less interference with the main line operations can be achieved by construction of a 2-mile long ancillary track within GEMCO Yard. More efficient yard operations, and a stricter discipline in the calling and operation of freight trains would minimize possible delays to passenger and freight trains because of conflicts.
4. Finding 19 is modified to read as follows:
 19. The proposed rail commuter service is feasible. Initially certain operational problems will be experienced but these can and should be resolved following a reasonable period for oper-

ational and public adjustment. After that adjustment period we will review the operational problems with a view to ordering CTC, new sidings, or other means of avoiding conflicts, should those measures be needed.

5. Finding 20 is modified to read as follows:

20. Caltrans has established to the Commission's satisfaction that it has:

- a. Two consists of eight rail passenger cars and sufficient locomotives available and ready to be used in the proposed service;
- b. Arrangements have been made for the maintenance of passenger cars and locomotives and for sale of tickets.

6. Finding 25 is moot and is deleted.

7. Finding 35 is added as follows:

35. The adjustment of the afternoon commuter schedules to create a timetable meet with Amtrak Train No. 12 will minimize delays.

8. Ordering Paragraph 4 is amended to read as follows:

4. Within thirty days prior to the commencement of service by SP, Caltrans shall establish to the Commission's satisfaction that an escrow account has been established containing deposits of \$1.3 million for the purpose of constructing station platforms and parking facilities and a deposit of at least one-half of the estimated costs of the first year operations as set forth in Exhibit 9.

9. Ordering Paragraph 7(a) is added as follows:

- 7(a) One year after commencement of the proposed service, SP or Caltrans may petition for the establishment of Centralized Traffic Control and/or construction of additional sidings or extension of existing sidings, in order to expedite passenger service or reduce delays to freight train operations. Said petition should set forth the facilities proposed to be constructed, the estimated construction costs, and a proposed division of such costs between Caltrans and SP based on the benefits accruing to each from such construction.

10. In all other respects, Decisions Nos. 91847, 92230, and the decision concurrently issued in this proceeding shall remain in full force and effect.

The effective date of this order is the date hereof.
Dated April 7, 1981, at San Francisco, California.

JOHN E. BRYSON
President
RICHARD D. GRAVELLE
LEONARD M. GRIMES, JR.
VICTOR CALVO
PRISCILLA C. GREW
Commissioners

EXHIBIT H**Decision No. 93118****BEFORE THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA**

COUNTY OF LOS ANGELES, STATE OF
CALIFORNIA,
Complainants,

vs.

SOUTHERN PACIFIC TRANSPORTATION
COMPANY, a corporation,*Defendant.*

Case No. 10575
(Filed
May 18, 1981)
(For appearances see Decision No. 91847.)**ORDER GRANTING STAY OF TIME FOR COMPLIANCE
WITH ORDERING PARAGRAPHS TWO AND SEVEN
IN DECISION 92863**

A petition for rehearing of Decision Nos. 92862 and 92863 has been filed by Southern Pacific Transportation Company, together with a petition for receipt of additional evidence and a petition for immediate suspension of the effective date of Decision No. 92862 pending the order on rehearing. The Commission has considered the petitions and the affidavits attached thereto and is of the opinion that the time for compliance set out in ordering paragraphs two and seven of Decision No. 92863 should be stayed pending further review of this matter. The State of California, Department of Transportation has advised it has no objection to said stay.

GOOD CAUSE APPEARING, the time for compliance set out in ordering paragraphs two and seven in Decision No. 92863 is hereby stayed until further order of the Commission.

This order is effective today.

Dated May 22, 1981 at San Francisco, California.

JOHN E. BRYSON

President

RICHARD D. GRAVELLE

VICTOR CALVO

Commissioners

Commissioner Leonard M. Grimes, Jr., being necessarily absent, did not participate.

Commissioner Priscilla C. Grew, being necessarily absent, did not participate in the disposition of this proceeding.

Decision No. 93211

June 16, 1981

**BEFORE THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA**

COUNTY OF LOS ANGELES, STATE OF
CALIFORNIA,

Complainants,

v.

SOUTHERN PACIFIC TRANSPORTATION
COMPANY, a corporation,

Defendant.

**Case No. 10575
(Filed
May 18, 1978)**

(For appearances see Decision No. 91847)

**ORDER MODIFYING DECISION 91847
AND DENYING REHEARING OF DECISION 92862 AND
DECISION 92863**

A petition for rehearing of Decision (D.) 92862 and D. 92863 has been filed by the Southern Pacific Transportation Company (SP), together with a petition for receipt of additional evidence and a petition for stay of D. 92863. In D. 93118, issued May 22, 1981, the Commission issued a stay of the time for compliance with ordering paragraphs 2 and 7 of D. 91847 (incorrectly referred to in D. 93118 as "ordering paragraphs two and seven of D. 92863"). We have carefully considered all the allegations of error contained in SP's petition for rehearing and are of the opinion that good cause for granting rehearing of D. 92862 and D. 92863 has not been shown. However, we shall modify our Discussion, Findings of Fact and Conclusions of Law in D. 91847, as modified in D. 92863 following the limited rehearing of D. 91847 granted in D. 92230, to reflect the further study which has been given to this matter upon consideration of

the petition for rehearing and, in particular, the Exhibits attached thereto which were proposed for receipt into evidence by SP.

SP's petition for rehearing contains three claims: (1) findings in D. 91847 and 92863 regarding operational feasibility of the proposed commuter service are not supported by the record; (2) in ordering the service instituted before all operational difficulties have been completely resolved, the Commission abused its discretion and failed to lawfully exercise its powers, and (3) D. 92863 imposes an unreasonable burden on interstate commerce. SP claims these issues can only be resolved through new evidentiary hearings.

We first note that SP's first claim, when closely examined, is not so much a claim that the present factual record is inadequate per se, as it is a claim that the record should be reopened to take account of allegedly changed circumstances which have arisen since 1979, as set forth in the new exhibits attached to the petition for rehearing. As a matter of law, rehearing need not be granted just because the circumstances upon which a Commission order was based have changed, barring, of course, a truly cataclysmic change in circumstances. Public Utilities Code Section 1736 gives the Commission discretion to allow rehearing on the basis of changed circumstances, but does not require it. There is always some change in circumstances between the time of a Commission decision and the time when its practical effect is felt. To grant rehearing simply because the circumstances had changed in some small degree would open the possibility that no order would ever be effectuated, because of continuous petitions for rehearing based on allegedly changed circumstances.

As a matter of fact, however, the Commission is of course sensitive to changes in the world which may undermine its orders or render them impractical or unwise. We have closely scrutinized SP's claims of changed circumstances and the responses filed by complainant Caltrans claiming that no new evidence has been put before the Commission. We conclude, as explained below, that SP has not demonstrated changed circumstances and that the petition for receipt of additional

evidence should be denied. Some of SP's arguments are based upon misunderstandings of the Commission's true intent, due in part we suspect, to a desire on the part of SP to exaggerate the consequences of our order. Accordingly, D. 91847 is modified as provided below.

We begin with the comments which SP has directed toward modified Finding of Fact 17. There it is stated that "Complainant's . . . analysis presents the most favorable possible operations, and ignores some of the inevitable conflicts which will arise" between SP freight operations and the commuter trains. It appears SP has interpreted the words "inevitable conflicts" as implying something much, much more than "minor, inconsequential, infrequent and usually costless conflicts," which is the sense in which the finding of fact was made. Simply because some operations must briefly cease on certain portions of the *main line* during certain portions of the morning and evening "window" noted in Finding 17 does not mean that all SP freight operations must cease or suffer chaos, that SP cannot structure its freight operations to avoid conflicts or that, as SP claims (Petition for Rehearing, p. 23), the commuter trains will have a "devastating impact" on freight operations. This claim, like SP's claim that the Commission has shown "utter indifference" (petition for Rehearing, p. 10) to freight interference, is groundless and inconsistent with the voluminous record. Further, as explained in greater detail below, those freight delays which are not costless to SP and which are attributable to operation of the commuter trains are a proper subject for compensation from complainant to SP.

Finally, we openly state that institution of the commuter passenger service is in the nature of an experiment (see Finding of Fact 19). It may be, as we believe the evidence overwhelmingly shows, that commuter trains and freight trains can again successfully be operated on the Coast Line, or it may be that they cannot. We cannot predict all future conditions on that line or whether SP can operate the commuter service without delay. But the experimental (or more properly, the experiential) nature of the orders in Decisions 91847, 92230 and 92863 does not leave them invalid. As the California Supreme Court stated in *Southern Pac. Co. v. Public Utilities Co.* (1953) 41 Cal. 2d 354, 367, "The fact that the effect of the

order . . . is to a more or less degree experimental does not destroy it. If it does not work out as contemplated the commission has jurisdiction to entertain a future application concerning the same subject matter." In light of the foregoing discussion, Finding of Fact 17 is modified to read:

17. SP's interference study is a "worst case" analysis of the train conflicts which would result if the proposed commuter service is authorized. It shows a two-hour window in the morning and evening during which time freight operations must cease on the main line while the commuter trains operate. Complainant's similar analysis presents the most favorable possible operations, and ignores some of the inevitable conflicts which will arise. Complainant's study shows a thirty-three minute window in the morning and a forty-five minute window in the evening when freight trains must cease operations on the main line because of commuter operations. Under either analysis, some delays to freight service will occur, but, on balance, the existing line is capable of accommodating both the commuter service and freight service. Such conflicts and delays as do occur will generally be minor and inconsequential and, with experience, more and more infrequent.

We next answer SP's comments regarding possible delay, not of its freight trains, but of the commuter trains. SP states that it is "simply impossible to create delay-free meets between opposing trains" (Petition for Rehearing, p. 16). This comment again ignores the experimental nature of the service. It is certain that perfect meets between the Amtrak and commuter trains will not always be possible. The fact that the meets are not always delay-free is no reason not to institute the service; the fact that commuters might grow disillusioned with the service due to delays to their train is Caltrans', not SP's concern. Which train has priority can be negotiated; there is no law giving the Amtrak train priority. In some cases, where, for example, the Amtrak train reaches Oxnard on time (with 58 minutes to then travel the short distance from Glendale to Los Angeles), the most sensible thing for SP to do may be to hold the Amtrak train briefly in a given siding until the passenger

train has passed. In other cases the passenger train will have to accept delay and wait until the Amtrak train has cleared. Depending on the Amtrak train performance on any given day, many possibilities will arise.

SP claims (Petition for Rehearing, p. 16) there is a "lack of sidings in the territory where the meets are to take place." Again, this is a mischaracterization of the record. There are five sidings, including Hewitt, between Burbank Junction and Oxnard; these sidings are approximately 10 to 15 minutes apart for trains going 50-60 mph. These sidings are adequate and available for meets between the opposing trains, even with the new Amtrak schedule in effect (See SP's proffered Exhibit B and Caltrans' Supplemental Response). In its Exhibit B, SP again projects delays on the basis of a two-hour trip between Los Angeles and Oxnard, rather than the shorter trip we foresee. So again we conclude that only actual experience will tell. We cannot predict whether SP, in operating both the Amtrak and commuter trains, will attempt to make the meets happen with minimum delay. As noted below, where the Amtrak train is delayed due to the commuter train and SP accordingly loses incentive payments to which it otherwise would be entitled, those payments are a matter for compensation to be paid to SP by complainant. Finally, we reject as speculative the possibility of an increased number of Amtrak trains. In light of the foregoing discussion, Finding of Fact 35 as it appears in D. 92863 is modified to read as follows:

35. The fact that the afternoon commuter trains may suffer delays due to the oncoming Amtrak train is not cause not to institute the requested passenger service. Schedules can be adjusted to minimize delays. Five sidings between Burbank Junction and Oxnard are adequate for arranging meets between the trains. Even with the new Amtrak schedule, such delays will generally be of minimal duration and, with experience, more and more infrequent.

We next direct our attention to SP's comments regarding Finding of Fact 18, the increase in traffic expected at GEMCO Yard, expanded Anheuser-Busch operations, and allegedly new "time sensitive exempt perishable, trailer-on-flatcar ("TOFC") and contract traffic" on guaranteed schedules on the Coast Line

(including the "Golden State" and "Energy Saver" trains). The comments do not truly present changed circumstances.

First, the fact that GM has now returned to two shifts a day is of no significance. Prior to D. 91847, as the parties tried Case (C.) 10575, it was universally assumed that GM would be on two shifts. The record was put together on this basis. The Commission found the trackage and yards adequate in D. 91847. It is still adequate. Second, the expansion of Anheuser-Busch activities is not directly linked in SP's petition and exhibits to any particular delay of either freight or passenger service. Anheuser-Busch itself does not predict such delay in its sworn statement. Third, the GULAP, LAOAT and OALAT trains referred to by SP were all in operation when the record was put together prior to D. 91847. We have said before and we say again that the evidence convinces us that SP can, if it wishes, schedule its freight operations (such as the "Energy Saver" train to Oakland) around or between the commuter service without significant inconvenience or cost. Delays to GM freight or agricultural produce for the "Golden State" train are at most speculative, based on the degree to which SP can institute, or wishes to institute, new operational efficiencies. We are still at an experimental stage. Further, as explained below, such freight delays as are truly unavoidable despite SP's best efforts and which are truly attributable to the commuter service are a matter for compensation to be paid by complainant to SP. In light of these comments, Finding of Fact 18 in D. 91847, as modified by D. 92863, is modified to read as follows:

18. SP's GEMCO and Taylor Yards pose a potential problem for conflicts with the proposed commuter trains, but a major contributing factor is SP's practice of making up trains on the main tracks adjacent to both yards. Better utilization of GEMCO Yard facilities and less interference with the main line operations can be achieved by construction of a 2-mile long ancillary track within GEMCO Yard. More efficient yard operations, and a stricter discipline in the calling and operation of freight trains would minimize possible delays to passenger and freight trains because of conflicts.

SP also raises questions regarding what we still consider as minor operational difficulties, such as the question of train storage and crew replacement at Oxnard. We believe that our previous comments regarding the experimental nature of the service answer SP's comments.

We come now to SP's claims that D. 92863 imposes an unreasonable burden on interstate commerce. As stated above, we reject absolutely SP's claim that the commuter service will have a "devastating impact" on intrastate and interstate shippers using SP freight service. This exaggeration is not supported even by SP's proffered exhibits. Such disruption of its freight service as occurs will be minimal. Its ability to fulfill contract obligations to shippers and Amtrak will not be significantly impaired, if at all. There will be no interference with SP's exercise of rate and service flexibility under the Staggers Act due to the minor, inconsequential and infrequent delays noted in Finding of Fact 17.

However, we believe other comments made by SP regarding compensation for costs attributable to the commuter service and return on property devoted to the service are well taken and require modification of D. 91847. We believe these modifications resolve SP's claims regarding financial loss as constituting a burden on interstate commerce. In our view, SP must be compensated for all costs and paid the return required by law, whether federal or state statutory or constitutional law, for the property devoted to this service.

Finding of Fact 13 in D. 91847 was based in part on the discussion appearing on pages 65 and 66 in that decision. The finding and the discussion mistakenly provide that SP should be able to bear certain expenses from the commuter service because of its overall financial health. While as a matter of fact this might be true, it certainly is not compatible with due process. Caltrans provided at the start of C. 10575 that it would pay all "actual and reasonable operating deficits of this service." (Exhibit 9, p. 3). We interpret this to mean that Caltrans will pay all costs actually and reasonably attributable to the institution of the commuter service. In light of the foregoing discussion, Finding of Fact 13 is modified to read:

13. Complainant will reimburse SP for all costs actually and reasonably attributable to the commuter service.

Finding of Fact 30 in D. 91847 provides that "No allowance should be made for costs attributable to the interference with SP's freight trains." This finding fails to reflect the discussion appearing at page 65 of D. 91847, which merely provides that no such allowance should be made during the period of negotiations. Our thought was that such a provision might provide SP with an incentive, during the period of negotiations, to tighten up its freight operations so that unnecessary delay would be eliminated. But again, upon reconsideration, we find such a provision inconsistent with due process. SP must be compensated for all costs actually and reasonably attributable to the institution of the commuter service. This includes freight delay costs and any lost incentive payments due to delay of the Amtrak train.

We are sensitive to the possibility that lax operations could result in SP's attempting to recover freight or Amtrak delay costs not truly attributable to the commuter service. Such matters might ultimately require a hearing upon application by SP for an order from the Commission to Caltrans to pay specified freight or Amtrak delay costs. If the facts warranted such an order, we would unhesitatingly issue it. In light of the foregoing discussion, Finding of Fact 30 is modified to read:

30. SP will be compensated for all freight and Amtrak delay costs actually and reasonably attributable to the commuter service.

In Finding of Fact 32 in D. 91847, the Commission stated that the subsidy paid to SP by Caltrans "should provide SP with a 7½ percent rate of return, which we find just and reasonable." In its petition for rehearing, SP indicates that the ICC has determined that it is entitled to a return of 11.7 percent. Upon the present record, which was developed in 1979, a return of 7.5 percent is reasonable. But it is now 1981 and the rate or return clearly must be brought up to date. This is nothing new in the field of utility regulation. We do not grant continual rehearings of past general rate cases simply because of the passage of time. Instead we provide for new applications

asking for offset rate increases or permit new general rate applications to be filed. The same holds true in this case. SP can file an application requesting a higher rate of return and should adduce whatever evidence in support of that application it feels is appropriate, including such evidence as apparently convinced the ICC to grant it an 11.7 percent return. We have no intention of forcing SP to subsidize the commuter service with profits from other areas of its operations, such as its interstate operations. Such a cross-subsidization might well run afoul of the Staggers Rail Act of 1980, P.L. 95-473. We will require Caltrans, not SP, to subsidize the commuter service. We cannot determine now what the actual rate of return will be, but it will be all that federal and state statutory and constitutional law require it to be.

Practically, however, the amount of money to be paid by Caltrans to SP for operating the commuter service is subject to negotiation. The "plus" in a "cost-plus" contract between SP and Caltrans is analogous to the rate of return and must be set through negotiation. We urge SP and Caltrans to enter into negotiations in the same spirit which led to SP's agreement to operate commuter trains for Caltrans on the San Francisco peninsula. Such negotiations can include all costs, such as freight delay costs, operating costs, rentals for SP properties used for stations and parking lots and capital improvement costs for accommodation of the service. In light of the foregoing discussion, Findings of Fact 32 and 33 are modified to read as follows:

32. In addition to meeting all costs actually and reasonably attributable to the commuter service, Caltrans will pay SP a just and reasonable return on the property devoted to the service. Based on a factual record compiled in 1979, we previously determined in D. 91847 that 7.5 percent constituted a just and reasonable rate of return. In light of changed circumstances, this rate is inadequate. SP and Caltrans should negotiate the question of return in negotiating a contract meeting all costs. Alternatively, SP may file a new application asking for a higher rate of return. The Commission will determine a just and reasonable rate of return in light of federal and state statutory

and constitutional law, including the return allowed to SP by the ICC.

33. Certain SP properties, upon which station platforms and parking areas would be installed, are presently subject to written leases containing 30-day cancellation clauses or are being held for future industrial or commercial development. Caltrans will pay SP a reasonable rental for all properties used for the commuter service.

Based on all of the foregoing discussion, we further modify D. 91847 to add Finding of Fact 36, reading as follows:

36. Institution of the commuter service will not place an unreasonable burden on interstate commerce.

We next consider SP's understanding of Ordering Paragraph 7(a) as it appears in D. 92863. SP interprets it to provide "that capital improvements would be directed only after SP has endured a year of crippling interference to its coast line operations and deterioration of its freight business, and/or it is established that an acceptable on time commuter service cannot be provided on the existing single track facilities. It further contemplates that SP would be required to bear at least part of the cost of these improvements."

Such colorful language notwithstanding, we do not find that "crippling interference" or "deterioration" of SP's freight service will occur. During the experimental state of this service, it may be that SP will incur freight and Amtrak delay costs attributable to the commuter service which are unavoidable despite all possible operational efficiencies. As modified, our order provides that SP must be compensated for such costs. After one year, all parties, including the Commission, will be in a position to determine what improvements, if any, are required on the Coast Line and whether SP should bear any costs of those improvements based on the benefit it obtains from such improvements. We express no fixed opinion on this matter at this time. There will be time for SP to argue it should bear no costs of such improvements. In light of the foregoing discussion, we do not believe that Ordering Paragraph 7(a) requires further modification.

Finally, SP suggests in Exhibit D, but does not claim in its Petition for Rehearing, that the enactment of the Staggers Rail Act of 1980, P.O. 95-473, divests the Commission of jurisdiction to order the institution of the commuter service because the Commission has not been certified under Section 214 of the Act. (49 U.S.C. Sec. 11501, as amended). We disagree. The legislative history of the Staggers Act is absolutely silent on the question of whether its provisions apply to common carrier passenger service. There is no indication that Congress intended the Staggers Act to apply to passenger service. Its provisions deal entirely with freight service. Its freight rate provisions are entirely inapposite to passenger service. (See, e.g., 49 U.S.C. §§ 10701, 10709 and other sections of Title 49 referred to in Exhibit D). Further, as modified today, our orders provide for a full "cost-plus" contract between SP and Caltrans, so that SP bears no financial loss or responsibility for this service. This will put the Los Angeles-Oxnard service on virtually the same footing as the San Francisco Peninsula passenger service. Finally, under Article III, Section 3.5 of the California Constitution, we cannot find ourselves divested of jurisdiction by federal legislation in the absence of an appellate court decision to that effect. In these circumstances, we reject the suggestion that we no longer have jurisdiction to order this passenger service instituted.

No further comment is required in support of Decisions 91847, 92230, 92862 and 92863.

ORDER

It is hereby ordered that Decision 91847, as modified by Decision 92863, is further modified as provided herein.

1. Findings of Fact 13, 17, 18, 30, 32, 33, 35 and 36 are modified and added, to read as follows:

13. Complainant will reimburse SP for all costs actually and reasonably attributable to the commuter service.

17. SP's interference study is a "worst case" analysis of the train conflicts which would result if the proposed commuter service is authorized. It shows a two-hour window in

the morning and evening during which time freight operations must cease on the main line while the commuter trains operate. Complainant's similar analysis presents the most favorable possible operations, and ignores some of the inevitable conflicts which will arise. Complainant's study shows a thirty-three minute window in the morning and a forty-five minute window in the evening when freight trains must cease operations on the main line because of commuter operations. Under either analysis, some delays to freight service will occur, but, on balance, the existing line is capable of accommodating both the commuter service and freight service. Such conflicts and delays as do occur will generally be minor and inconsequential and, with experience, more and more infrequent.

18. SP's GEMCO and Taylor Yards pose a potential problem for conflicts with the proposed commuter trains, but a major contributing factor is SP's practice of making up trains on the main tracks adjacent to both yards. Better utilization of GEMCO Yard facilities and less interference with the main line operations can be achieved by construction of a 2-mile long ancillary track within GEMCO Yard. More efficient yard operations, and a stricter discipline in the calling and operation of freight trains would minimize possible delays to passenger and freight trains because of conflicts.

30. SP will be compensated for all freight and Amtrak delay costs actually and reasonably attributable to the commuter service.

32. In addition to meeting all costs actually and reasonably attributable to the commuter service, Caltrans will pay SP a just and reasonable return on the property devoted to the service. Based on a factual record compiled in 1979, we previously determined in D. 91847 that 7.5 percent constituted a just and reasonable rate of return. In light of changed circumstances, this rate is inadequate. SP and Caltrans should negotiate the question of return in negotiating a contract meeting all costs. Alternatively, SP may file a new application asking for a higher rate of

return. The Commission will determine a just and reasonable rate of return in light of federal and state statutory and constitutional law, including the return allowed to SP by the ICC.

33. Certain SP properties, upon which station platforms and parking areas would be installed, are presently subject to written leases containing 30-day cancellation clauses or are being held for future industrial or commercial development. Caltrans will pay SP a reasonable rental for all properties used for the commuter service.

35. The fact that the afternoon commuter trains may suffer delays due to the oncoming Amtrak train is not cause not to institute the requested passenger service. Schedules can be adjusted to minimize delays. Five sidings between Burbank Junction and Oxnard are adequate for arranging meets between the trains. Even with the new Amtrak schedule, such delays will generally be of minimal duration and, with experience, more and more infrequent.

36. Institution of the commuter service will not place an unreasonable burden on interstate commerce.

2. The petition for receipt of additional evidence is denied.

3. Rehearing of Decisions 91847, 92862 and 92863 is denied.

4. The stay granted in Decision 93118 shall remain in effect until further order of the Commission.

This order is effective today.

Dated June 16, 1981 at San Francisco, California.

JOHN E. BRYSON

President

RICHARD D. GRAVELLE

LEONARD M. GRIMES, JR.

VICTOR CALVO

PRISCILLA C. GREW

Commissioners

Decision 82-06-045

June 2, 1982

**BEFORE THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA**

COUNTY OF LOS ANGELES,
STATE OF CALIFORNIA,

Complainants,

v

SOUTHERN PACIFIC TRANSPORTATION
COMPANY, a corporation,

Defendant.

**Case 10575
(Petition for
Modification
of Decision 91847
et al.;
Filed April 22,
1982)**

**ORDER MODIFYING DECISIONS
91847, 93118, and 82-02-048**

This is a complaint in which the County of Los Angeles (County) and the State Department of Transportation (Caltrans) seek an order of the Commission directing Southern Pacific Transportation Company (SP) to operate a commuter passenger train service between Los Angeles and Oxnard.¹ Decision (D.) 90018 issued February 27, 1979 denied SP's motion to dismiss on jurisdictional grounds. D.90417 dated June 5, 1979 denied SP's petition for rehearing of D.90018.

Following public hearing, the Commission issued D.91847 on June 30, 1980. That decision as amended by D.92863 and D.93211 ordered:

1. Within thirty days after the effective date hereof, the State of California Department of Transportation (Caltrans) shall submit to Southern Pacific Transportation Company (SP) and file with this Commission locations,

¹ By D.92862 issued April 7, 1981, the County of Los Angeles was dismissed as a complainant.

plans, and specifications for station platforms and parking facilities.

2. Within ninety days after receipt of the plans and specifications provided for in Ordering Paragraph 1 hereof, SP shall construct the platforms and parking facilities in accordance with said plans, and specifications and shall, upon ten days' notice to the Commission and the public, commence operations of two commuter passenger trains between Los Angeles and Oxnard with intermediate stops at Camarillo, Moorpark, Santa Susana (Simi Valley), Chatsworth, Northridge, Panorama, Airport, Burbank, and Glendale. Said service shall be provided subject to the condition that Caltrans shall subsidize deficits resulting from such operation.
3. SP shall operate the rail service provided for in Ordering Paragraph 2 hereof between the hours of 6 a.m. and 8 a.m. and between 4 p.m. and 6 p.m. daily, Monday through Friday, holidays excepted.
4. Within thirty days prior to the commencement of service by SP, Caltrans shall establish to the Commission's satisfaction that an escrow account has been established containing deposits of \$1.3 million for the purpose of constructing station platforms and parking facilities and a deposit of at least one-half of the estimated costs of the first year operations as set forth in Exhibit 9.
5. Within one hundred eighty days after the effective date hereof SP, Caltrans, and the County of Los Angeles shall negotiate and submit to this Commission for its approval an agreement relating to the equipment and facilities to be used in providing said commuter service and the method to be applied in subsidizing deficits that may result therefrom.

6. During the period of negotiations funds deposited in the escrow account provided for in Ordering Paragraph 4(c) hereof, shall be used for the purpose of inaugurating and maintaining the commuter service. When an agreement has been reached and actual costs have been determined adjustment will be made accordingly.
7. Within sixty days after the effective date hereof, and on not less than ten days' notice to the Commission and to the public, SP shall amend its tariffs and timetables on file with the Commission to reflect the service herein authorized and ordered.
- 7(a) One year after commencement of the proposed service, SP or Caltrans may petition for the establishment of Centralized Traffic Control and/or construction of additional sidings or extension of existing sidings, in order to expedite passenger service or reduce delays to freight train operations. Said petition should set forth the facilities proposed to be constructed, the estimated construction costs, and a proposed division of such costs between Caltrans and SP based on the benefits accruing to each from such construction.

D.93211 issued June 16, 1982 denied rehearing of D.92862 and D.92863 and modified the findings set forth in D.91847 and D.92862. D.93118 dated May 22, 1981 stayed the time for compliance with Ordering Paragraphs 2 and 7 of D.91847 until further order of the Commission.

By several orders culminating in D.82-05-039 issued May 4, 1982, the time for compliance with Ordering Paragraph 5 of D.91847 was stayed until further order of the Commission.

Caltrans' Request

By its Petition for Modification filed April 22, 1982, Caltrans seeks the following:

1. The stay order in D.93118 be dissolved
2. Ordering Paragraph 2 of D.91847 be modified as follows:

- a. On June 1, 1982 SP shall commence the following construction:

- (1) Constriction of station platforms and parking substantially in accordance with the plans and specifications on file with this Commission.

- (2) Construction of track work in accordance with Exhibit A of the proposed Construction and Maintenance Agreement submitted with this petition.

- b. The construction described above shall be prosecuted diligently by SP to conclusion on or before September 30, 1982.

3. Ordering Paragraph 7 of D.91847 be modified as follows:

"On or before October 15, 1982, SP shall amend its tariffs and timetables on file with this commission to reflect the service herein authorized and ordered. Said tariffs and timetables shall be provided by Caltrans to SP on or before October 1, 1982."

4. Ordering Paragraph 5 of D.91847 be modified as follows: "SP shall, on the effective date of this order, negotiate with Caltrans in order to reach agreement on the service, lease and construction agreements. If the parties have not agreed on the costs thereof within six months from the effective date of the commission's order, the commission shall determine the costs by further order."

5. Ordering Paragraph 4 of D.91847 be changed to require SP to commence service on November 1, 1982, and further to require that CalTrans shall provide evidence to the commission on or before May 10, 1982, that the sum of \$1,974,900 has been encumbered to perform the agreements submitted herewith, or the orders herein requested shall not be effective until further order of the commission.

Reasons Advanced in Support of Caltrans' Request

Caltrans states that the purpose of its petition is to make certain the time for compliance with various orders of this Commission.

Caltrans states that while it and SP have been negotiating for the terms of payment of the various services to be provided by SP, these negotiations are not expected to be complete by May 4, 1982, the time specified in D.82-02-048 for submission of the service agreement to this Commission for approval.²

Caltrans' firm offer to SP is submitted with its petition to indicate the readiness of Caltrans to finance this service. Caltrans urges that the reasonableness of its offer is not in issue now. It asks that we fix the costs of construction and operation if SP and Caltrans cannot agree.

By Ordering Paragraph 1 of D.91847 (the time of compliance having been extended during rehearing of D.91847), Caltrans submitted to SP and filed with the Commission, locations, plans, and specifications for the station platforms and parking. As a result of subsequent meetings with SP, the station locations, plans, and specifications have been revised and are reflected in the locations, plans, and specifications submitted to SP and filed with the Commission on April 16, 1982. Caltrans states that while these plans do not include utility relocation or comments from local agencies, they are sufficient for SP to commence construction in accordance with them on June 1, 1982. Caltrans anticipates no changes in the station locations, and no substantial changes in the plans and specifications as a result of review by the local agencies.

Ordering Paragraph 4 of D.91847 referred to an "escrow" account being established 30 days prior to commencement of the service. Caltrans states that not only did this paragraph not establish a time certain for SP to commence operation of the service, but it presented unexpected difficulty for Caltrans in establishing an escrow account. In fact, no escrow account has been established. However, Caltrans believes that evidence

² The petition asks for an extension of time to comply with Ordering Paragraph 5 of D.91847. Time for compliance with that provision had been extended to May 4, 1982 by D.82-02-048. D.82-05-039 issued May 4, 1982 extended time for compliance

satisfactory to the Commission will be presented by May 10, 1982, which will establish that the funds necessary to commence the construction and the service are available for payment to SP for timely compliance with the orders requested in this petition.

The petition states that the necessity for Caltrans' request is related to Caltrans' source of funds for the service. The funds to finance the service are derived from Senate Bill 620, Chapter 161 of the 1979 statutes, Section 71(c). This three-year funding program will expire on June 30, 1982. Money not encumbered by that date will not be available after June 30, 1982. The evidence to be provided by May 10, 1982 by Caltrans assertedly will demonstrate that the orders requested here will, if issued by the Commission, be sufficient to encumber the funds and make the money available for this service after June 30, 1982.

Staff Response

The staff response states that it has reviewed the plans and specifications on file and called for in Paragraph 1 of D.91847 to be submitted to SP and the Commission. Originally under D.91847, SP was to have commenced and completed construction of the stations and parking lots by Ordering Paragraphs 2 and 7 within 90 days from the decision's original effective date. The Commission in D.93118 indefinitely stayed the time for compliance, pending further review of this matter.

The staff also draws attention to the fact the court review of its decisions relating to this ordered commuter rail service has been exhausted by the final decision of the California Supreme Court filed December 23, 1981, (S.F. 24316) denying SP's petition for writ of review, thus rendering a final judgment on the merits of this matter.

The staff believes SP can commence construction of the station platforms and parking lots by those documents as originally ordered in D.91847, inasmuch as the staff and SP have had ample time to review the plans and specifications with respect to their conformance to the Commission decisions and relevant general orders.

Staff urges the Commission do only what is reasonably necessary to cause the initiation of the rail service ordered. The first step necessary is the establishment of times specific for the commencement of construction of the stations and parking lots detailed in the "plans and specifications" for these facilities on file with the Commission for a number of months. That could be accomplished if the Commission lifts the stay order in effect for commencement and completion of construction of the stations and parking facilities and sets a date certain for construction.

Staff urges that the other requirements upon SP requested by Caltrans in its petition should not be dealt with at this time pending further review by the staff. Therefore, staff urges the Commission lift the indefinite stay on construction made effective by D.93118 and set specific dates for commencing and completing construction of the stations and parking facilities. The petition can then be evaluated more carefully to determine to what extent, if any, further orders should be issued. Staff suggests that June 15 is a reasonable time for SP to commence construction of the stations and parking facilities and that they could reasonably be completed in 120 days, on October 15. (This period would give SP an additional 30 days longer than the original order for completion of these facilities.)

Paragraph 7 of D.91847 required SP submit within 60 days of the effective date of that order (and on 10 days' notice to the Commission and the public) revised timetables and tariffs reflecting the rail service ordered in that decision. Staff recommends the stay also be lifted for compliance with Paragraph 7 and a date certain be set for compliance. The date for completion of the station and parking facilities, of October 15 would appear an appropriate date to order SP to submit the train tariffs and timetables called for in that paragraph, and staff urges the Commission to so order.

SP's Response

In its response, SP does not concede jurisdiction of this Commission to issue the order sought by Caltrans and urges that there is no legal requirement for it to negotiate with Caltrans on the issues. However, SP believes it is in the best

interests of both parties that a full, free discussion take place. SP claims that Caltrans' offers for subsidy payment and for construction of facilities are too low, and that Caltrans has ignored (to its advantage) the findings and dicta in prior Commission decisions concerning the payments reasonably due it from Caltrans. Therefore, SP, opposes the petition, insofar as it seeks adoption of Caltrans' proposed contract provisions.

SP also opposes any order that would lift the stay granted in D.93118. SP states as follows:

"Caltrans' petition stresses that it has an urgent need for the requested schedule modifications so that it can sequester SB 620 funds, which were earmarked three years ago by the State Legislature for the state rail experiment by June 30, 1982. If Caltrans does not encumber those monies pursuant to a Commission order, this would simply mean that Caltrans would have to resubmit its need for the proposed commute trains to the legislature. We submit that this would be in the public interest. In view of the present transportation projects, which would benefit greater numbers of riders at considerably less expense, it is likely that the Legislature might conclude, as the Board of Supervisors for the County of Los Angeles did just last year, that the proposed service is "not needed at this time." In any event, the present SB 620 appropriation, which is based on Caltrans' original budget for its share of the commute service, is wholly inadequate to cover the additional expenses it assumed when County dropped out of the case or the subsidy requirements imposed by Decision 93211. Regardless of the instant petition, *Caltrans* *rans* will have to go before the Legislature this year for additional funding for the trains. The primary purpose of the instant petition, it seems, is to support an argument to the legislature that the project has been irretrievably committed, and is beyond further examination or recall. The Commission should not permit its process to be so used as to frustrate legitimate legislative oversight."

Discussion

We adopt the staff's recommendations. The only actions we should take at this time are those reasonably necessary to cause the initiation of the ordered rail service. The first step is the establishment of times specific for commencement of the construction of the stations and parking lots detailed in plans for such facilities on file for a number of months. This will be accomplished by lifting the stay of that portion of Ordering Paragraph 2 of D.91847 directing construction of such facilities. We concur with the staff analyses that June 15, 1982 is a reasonable time for SP to commence construction of station and parking facilities, and that such construction should be completed 120 days after.

We also agree with the staff that the stay of Ordering Paragraph 7 of D.91847 should be lifted and a date certain for the filing of timetables and tariffs should be established. That filing date should be October 15, 1982, the date for completion of construction of the parking and station facilities.

In all other respects, the petition for modification filed by Caltrans is premature and unnecessary at this time and should be denied. The order should become effective today so that construction may commence immediately.

IT IS ORDERED that:


1. The stay ordered in D.93118 of the time for compliance with Ordering Paragraphs 2 and 7 of D.91847 is dissolved.
2. Ordering Paragraph 2 of D.91847 is modified to read as follows:
 2. On or before June 15, 1982, Southern Pacific shall commence the following construction:
 - a. Construction of station platforms and parking substantially in accordance with the plans and specifications on file with this Commission:

b. Construction of track work in accordance with Exhibit A of the proposed Construction and Maintenance Agreement submitted with Caltrans' petition filed April 22, 1982.

The construction specified in subparagraphs a and b shall be prosecuted diligently by SP to conclusion on or before October 15, 1982.

3. Ordering Paragraph 7 of D.91847, as amended by D.92862, is modified to read as follows:

7. On or before October 15, 1982, SP shall amend its tariffs and timetables on file with this Commission to reflect the service authorized and ordered. These tariffs and timetables shall be provided by Caltrans to SP on or before October 1, 1982.

4. In all other respects, Caltrans' petition for Modification filed April 22, 1982 is denied. 

This order is effective today.

Dated June 2, 1982, at San Francisco, California.

JOHN E. BRYSON

President

RICHARD D. GRAVELLE

LEONARD M. GRIMES, JR.

VICTOR CALVO

PRISCILLA C. GREW

Commissioners

Decision 82-10-031

October 6, 1982

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

DEPARTMENT OF TRANSPORTATION
STATE OF CALIFORNIA,

Complainant,

v.

SOUTHERN PACIFIC TRANSPORTATION
COMPANY, a corporation,

Defendant.

**Case 82-08-01
(Filed
August 4, 1982)**

O. J. Solander, Eugene Bonnstetter, and Robert B. Patterson, Attorneys at Law, for California Department of Transportation, complainant.

Douglas E. Stephenson, Ann Hasse, and Carol Harris, for Southern Pacific Transportation Company, defendant.

James P. Jones and Roger E. Willeford, for United Transportation Union, intervenor.

Vincent MacKenzie, Attorney at Law, for the Commission staff.

INTERIM OPINION

California Department of Transportation (CalTrans) by this proceeding seeks an order to show cause why the officers and directors of Southern Pacific Transportation Company (SP) should not be found in contempt for failure to construct station platforms and parking facilities for eight stations as required by Decision (D.) 91847 in Case (C.) 10575.

D.91847 dated June 3, 1980 ordered SP to construct passenger station platforms and parking facilities in SP's right-of-way between Los Angeles and Oxnard in accordance with plans and specifications on file with the Commission. D.82-06-045 dated June 2, 1982 set the effective date for commencement of the construction which is to be completed in time for SP to commence commuter train service between Los Angeles and Oxnard on October 15, 1982.

In its answer to the complaint in C.82-08-01, SP indicated that it had prepared plans and specifications for several stations, but had not commenced construction in time to commence service on October 15, 1982 for the several reasons specified in the pleading. As an additional defense, SP alleged that even if the construction had been completed on a timely basis, the service could not start on October 15, 1982, as CalTrans had not obtained the locomotives and cars required by D.82-06-045, and that funding for the service, in addition to startup costs, was not available. The construction costs for stations and parking, the costs of acquisition of rolling stock, and operating subsidies are to be paid by CalTrans to SP by D.91847 and D.82-06-045. In response to these allegations, CalTrans was directed to inform the Commission whether it met all of the conditions imposed on it by those decisions, and in particular, whether rolling stock and funding were available.

Public hearing on these issues was held in San Francisco on September 27 and 29, 1982, and the matter was taken off the calendar. Evidence was presented by CalTrans and SP. CalTrans' position at the hearing was that it is essential for public convenience and necessity that the proposed rail commuter service commence on the date set by this Commission of October 15, 1982. To that end it asked that its request for an order to show cause should be held in abeyance with respect to track work and that the Commission implement its orders in D.91847 and D.82-06-045 by directing SP to permit CalTrans right of entry upon the property of SP in order that CalTrans may construct station platforms and parking facilities at Simi Valley (Santa Suzana) and Panorama City (GEMCO) stations. CalTrans presented evidence that it could construct such facilities in time to commence rail commuter service on October

18, 1982 if an immediate order was issued under which it could gain access on the property of SP by October 6, 1982. CalTrans also presented tariffs and timetables for filing with the Commission containing an October 18th date for commencement of service.

SP presented testimony in support of its position with respect to an order to show cause, and in opposition to CalTrans' proposal described above. In particular, SP opposes a Commission order which would permit access by CalTrans to SP's properties, without indemnification by CalTrans for law suits against SP as a result of actions of CalTrans and its contractors. CalTrans did not offer such indemnification. The courts of this State are the proper forum to determine liability for actions of CalTrans and its contractors.

SP argued that this Commission has no authority to enter an order binding on SP which would permit CalTrans access to SP property. CalTrans takes the opposite view.

In order to expedite a decision on CalTrans' request for an immediate order, CalTrans was directed to file by September 30, proposed findings of fact, conclusions of law, and a proposed order granting the authority sought in this phase of C.82-08-01. SP was authorized to file its proposed findings of fact, conclusions and order by October 4, 1982. Those pleadings have been timely filed.

Findings of Fact

1. Amtrak has agreed to deliver to CalTrans six Amfleet Coaches for commencement of service on October 18, 1982. Amtrak has further agreed to provide ten Heritage Coaches to CalTrans by January 15, 1983, six of which will replace the Amfleet cars.

2. CalTrans cannot sign the lease agreement prepared by Amtrak for the passenger cars until funds are allocated for that purpose by California Transportation Commission (CTC).

3. CalTrans has requested the CTC to allocate \$2.4 million on October 8, 1982, for payment to Amtrak for lease of the passenger cars and locomotives for the 1982/83 fiscal year.

4. CalTrans is negotiating with Amtrak for delivery of an additional eight cars for the service.

5. The tariffs and schedule provided by CalTrans on September 27, 1982 are requested by CalTrans to be filed on behalf of SP as ordered by D.82-06-045.

6. The tariffs provided by CalTrans set the time for commencement of service at October 18, 1982.

7. The public and press have been notified of the status of the proceedings in C.10575. CalTrans is ready to inform the public of the imminent commencement of service.

8. CalTrans has set aside \$260,000 to market the inauguration of service.

9. Tickets for the service will be printed by CalTrans by October 18, 1982.

10. CalTrans has encumbered \$1 million for first year operational costs of SP and \$2 million for construction of the station platforms and parking facilities.

11. The Legislature has appropriated \$6 million for this service for fiscal year 1982/83.

12. CalTrans has purchased property outside SP right-of-way for \$762,400 for parking at Panorama City.

13. SP does not intend to construct the station platforms and parking facilities by October 15, 1982 as required by D.82-06-045.

14. SP does not intend to negotiate a subsidy agreement and submit it to this Commission in accordance with the decisions of this Commission.

15. CalTrans has proposed that it be allowed to construct station platforms and parking facilities at Simi Valley and Panorama City in accordance with plans on file with the Commission.

16. CalTrans has shown an ability to complete the construction at Simi Valley and Panorama City by October 18, 1982, provided that it is authorized to enter SP's property at those locations by October 6, 1982.

17. In lieu of issuing the order to show cause re contempt at this time, and to further implement our decisions in C.10575, CalTrans should be authorized to enter SP's property at Simi Valley and Panorama City to construct station platforms and parking.

18. CalTrans has withdrawn its request that an order to show cause re contempt issue for failure of SP to commence and complete track work as required by D.82-06,045.

19. Track work is not required for the commencement of service on October 18, 1982.

20. SP has failed to date to implement fully the decisions of this Commission.

Conclusions of Law

1. D.82-06-045 is final and conclusive.

2. If the Commission decides to issue an order to show cause re contempt, SP may present the defenses raised in its answer and motions filed September 7, 1982.

3. Further implementation of the decisions of this Commission will be accomplished by CalTrans' construction of station platforms and parking at Simi Valley and Panorama, and *relocation of track 6065 at Simi Valley* to the east end of Santa Suzana siding off Los Angeles Avenue.

4. Granting the right of entry to CalTrans at Simi Valley and Panorama City and authorizing CalTrans to construct station platforms and parking there is made to carry out the common carrier purposes to which SP's right-of-way and attendant structures and facilities have been dedicated since 1904. Liability for the action of CalTrans or its contractors must be determined by the appropriate court of law.

5. Service shall commence by SP on October 18, 1982, in accordance with the tariffs and timetables filed on September 27, 1982 if construction authorized to be performed by CalTrans is completed by that date.

6. An unforeseen emergency exists which requires the addition of this order to the Commission's public meeting agenda without public notice under provisions of Section 306(b) of the Public Utilities Code.

INTERIM ORDER

IT IS ORDERED THAT:

1. SP's first, second, third, fourth, and fifth motions to dismiss filed in C.82-08-01 are denied.

2. In order to commence passenger services in accordance with the decision in C.10575, CalTrans shall have the immediate right to enter SP property and construct station and parking facilities at Simi Valley and Panorama City, in accordance with plans on file with the Commission and to relocate track 6065 at Simi Valley to the east end of Santa Suzana siding off Los Angeles Avenue.

3. Further hearing on CalTrans' application for an order to show cause re contempt is scheduled at 10 a.m., October 18, 1982, in the Commission's Courtroom, State Building, San Francisco, California.

4. SP is directed to file with this Commission timetable and tariffs substantially as provided by CalTrans in its September 27, 1982 filing with the Commission, and such timetables and tariffs shall become effective October 18, 1982.

This order is effective today.

Dated October 6, 1982, at San Francisco, California.

JOHN E. BRYSON

President

RICHARD D. GRAVELLE

LEONARD M. GRIMES, JR.

VICTOR CALVO

PRISCILLA C. GREW

Commissioners

Decision 82-10-041

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

DEPARTMENT OF TRANSPORTATION
STATE OF CALIFORNIA,
Complainant,

v.

SOUTHERN PACIFIC TRANSPORTATION
COMPANY, a corporation,
Defendant.

Case 82-08-01
(Filed
August 4, 1982)

O. J. Solander, Eugene Bonnstetter, and Robert B. Patterson, Attorneys at Law, for California Department of Transportation, complainant.

Douglas E. Stephenson, Ann Hasse, and Carol Harris, for Southern Pacific Transportation Company, defendant.

James P. Jones and Roger E. Willeford, for United Transportation Union, intervenor.

Vincent Mackenzie, Attorney at Law, for the Commission staff.

EMERGENCY INTERIM OPINION

On Sunday, October 17, 1982, the Presiding Commissioner was advised by Caltrans that inauguration of the proposed Oxnard-Los Angeles commuter service may be delayed because of (a) the failure of timetable schedules filed by SP on October 15, 1982 to sufficiently comply with the requirements of Decisions Nos. (D.) 82-06-045 and 82-01-031 and, (b) refusal of Amtrak to release the locomotives which Caltrans has obtained for the service unless SP accepts the lease obligations imposed

by Amtrak. SP was duly notified of Caltrans' intention to seek an immediate remedial order from this Commission, and the parties have been heard under telephone conference procedures.

SP, in stipulating to the telephone conference procedure for the convenience of the parties in lieu of oral hearing, advises that it does not thereby waive its objections to the jurisdiction of the Commission to take the action requested by Caltrans. SP's objections are noted.

In response to Caltrans' contention that the schedules filed October 15 do not sufficiently comply with the requirements of the Commission's orders, SP asserts that it modified the schedule proposed by Caltrans to provide what it believed would be better "meets" with existing Amtrak trains and reduce conflicts with switching operations in the San Fernando Valley. Both of these changes, it asserts, are permissible within the scope of Ordering Paragraph 4 of D.82-10-031. However, SP notes that upon being advised by Caltrans of objections to the SP filing, it prepared an amended filing incorporating specifically the schedule times requested by Caltrans on September 27. That filing is accepted.

SP points out, correctly, that furnishing and maintaining locomotives for the service is an obligation of Caltrans, and that acceptance of the obligations of the Amtrak leases by SP would impose on SP requirements not contemplated by outstanding orders of the Commission. Caltrans, in response, states that time limitations make it imperative that SP be ordered to execute the equipment lease with Amtrak, and Caltrans has offered SP a supplemental contract whereby the obligations imposed on SP would in turn be accepted by Caltrans. In these circumstances it is reasonable to require that, on an interim basis, until Caltrans is able to secure locomotives without SP's participation, SP be required to lease the locomotives from Amtrak, provided Caltrans is willing in turn to give SP an agreement assuming the monetary obligations of the Amtrak lease.

Caltrans further states that it has been advised by SP that SP believes it cannot, consistent with its position in its pending

action in the Federal courts challenging the Commission's jurisdiction over the subject matter, undertake construction of the remaining station sites designated by Caltrans. Caltrans states that in such event it is ready and willing to proceed immediately with construction, if given an appropriate right of entry to SP's property. In order to facilitate such construction and completion at an early date, Caltrans should be given the requested right of entry, and SP should be directed to furnish necessary flagmen and construction inspectors, at Caltrans' expense, when Caltrans or its contractors are working on or near the SP tracks.

FINDINGS OF FACT

1. An emergency exists which requires immediate action by the Commission in order to commence the rail service ordered in D.91847, as subsequently modified, in D.82-06-045. Affected parties have consented to a telephone conference hearing, although in doing so, SP states that it does not wish to be deemed to have waived any objections to the Commission's jurisdiction over the subject matter.

2. The commuter train service schedule tendered by SP on October 17, 1982 is accepted for filing in lieu of the schedule filed by SP October 15, 1982.

3. Caltrans has advised the Commission that the locomotives it intends to furnish for this service are available for lease from Amtrak. Caltrans has further advised the Commission that such locomotives are available only if SP acts as Caltrans' agent as lessee of said locomotives. A copy of that lease is attached as EXHIBIT A.

4. Caltrans desires SP to act as its agent for the lease of said locomotives and has offered, under a reimbursement agreement set forth as EXHIBIT B, to reimburse SP for all costs, expenses, and monetary obligations imposed on SP by the annexed Locomotive Agreement or incurred by SP as a result of the provisions of the Locomotive Agreement.

5. Caltrans has asked that it be permitted to construct the remaining six stations at Moorpark, Burbank, Burbank Airport, Camarillo, Northridge, and Chatsworth.

6. To facilitate operation of the rail service ordered in D.91847, as subsequently modified, and in D.82-06-045, it is necessary to issue the Emergency Order contained in this decision.

CONCLUSION OF LAW

1. In the circumstances, the Commission has jurisdiction to order SP to commence the rail service and execute the Locomotive Agreement and Reimbursement Agreements attached hereto, to order Caltrans to reimburse SP as set forth in the Reimbursement Agreement, and to grant Caltrans a right of entry on SP property to construct station and parking facilities at Northridge, Moorpark, Camarillo, Burbank, Burbank Airport and Chatsworth.

2. The following order should issue, to be effective on the date of decision.

ORDER

(1) SP is ordered to operate the service commencing October 18, 1982 on the schedule tendered by SP on October 17, 1982, utilizing the passenger equipment furnished by Caltrans.

(2) SP is ordered to execute the Locomotive Agreement and the Reimbursement Agreements attached hereto as EXHIBITS A and B, and Caltrans is ordered to reimburse SP as set forth in the agreement it has offered.

(3) Caltrans shall have the immediate right to enter SP property, and SP is ordered to make such property available, to construct station and parking facilities at Northridge, Moorpark, Camarillo, Burbank, Burbank Airport and Chatsworth in accordance with plans on file with the Commission. SP shall provide at Caltrans' expense flag protection and personnel necessary for the safe completion of the construction. SP is directed to construct the track work at Camarillo in accordance with EXHIBIT A of the proposed Construction and Maintenance Agreement submitted with Caltrans' petition filed April 22, 1982.

This order is effective today.

Dated _____, at San Francisco, California.

EXHIBIT A**LOCOMOTIVE AGREEMENT**

This agreement, dated as of October 17, 1982, between National Railroad Passenger Corporation ("Amtrak") and Southern Pacific Transportation Company ("Railroad").

WITNESSETH:

WHEREAS, Amtrak has leased locomotives which it is able to make available to Railroad; to power commuter trains in service over Railroad's line between Oxnard and Los Angeles, California.

NOW, THEREFORE, the parties agree as follows:

1. Subject to the terms and conditions herein contained, Amtrak shall make available to Railroad up to five (5) P30 Locomotives ("Locomotives") for a period not exceeding one (1) year commencing as of the date hereof.

2. Railroad may operate the Locomotives solely in commuter service between Montalve and Los Angeles, California. Railroad shall comply with all governmental laws and regulations with respect to the use and operation of the Locomotives.

3. For the purposes of this agreement, Railroad shall be deemed to take possession of a Locomotive, and the agreement thereof shall commence upon departure of the Locomotive from Los Angeles, California. Railroad and Amtrak shall jointly inspect the Locomotives prior to delivery to Railroad and upon redelivery to Amtrak at Los Angeles. Railroad and Amtrak shall execute a Certificate of Inspection (Exhibit A hereto) noting the condition of the Locomotives and any damage other than normal wear and tear.

4. Railroad shall keep the Locomotives in good order, condition and repair, ordinary wear and tear excepted, and

in accordance with standards generally prevailing in the railroad industry. No modification may be made to the Locomotives without the prior written consent of Amtrak. Railroad shall not alter the road number on the Locomotives and shall not allow the name of any person, association or corporation to be placed on the Locomotives as a designation that might be interpreted as a claim of ownership.

Upon reasonable notice to Railroad and during normal business hours. Railroad shall permit authorized representatives of Amtrak to inspect any or all Locomotives and all relevant data and records pertaining to the operation of Locomotives.

5. For the use of said Locomotives, Railroad shall pay to Amtrak rental or three hundred fifty and 00/100 dollars (\$350.00) per unit per day. Railroad shall pay any and all taxes, licenses and permits whatsoever levied on said Locomotives or growing out of Railroad's use thereof under this agreement. Railroad further assumes the cost of any penalties assessed by national, state or local civic authorities, including but not limited to failure to provide licenses or permits, or for misuse of diesel units under applicable laws and regulations while in possession of Railroad. Bills for all amounts due Amtrak from Railroad hereunder shall be paid promptly by Railroad upon receipt thereof.

6. Amtrak shall not be deemed to have made or given, and Amtrak hereby expressly disclaims, any representation or warranty, express or implied, as to the merchantability, fitness for use, operation, condition or design of the Locomotives or the quality of the material, equipment or workmanship therein. Railroad hereby waives any claim against Amtrak for any loss of or use or loss of revenue, or incidental or consequential damages arising out of any defect in or failure of the Locomotives. Railroad agrees to indemnify and save harmless Amtrak, irrespective of any negligence or fault of Amtrak, its employees, agents, or servants, and irrespective of any defects in or failure of the Locomotives, or howsoever the

same shall occur or be caused, from any and all liability for injury to or death of any person or persons and from any and all liability for loss, damage or destruction to any property (other than the Locomotives) which arises from the operation of the Locomotives or other activities conducted hereunder.

7. In the event of any loss, theft, damage or destruction of a Locomotive exceeding \$3,000, the Railroad shall promptly notify Amtrak. Railroad shall promptly repair such damage or destruction at its own expense, and continue to pay rent for such Locomotives; provided however, if in the reasonable opinion of Railroad a Locomotive is damaged beyond economical repair. Railroad shall immediately pay Amtrak four hundred seventy-four thousand nine hundred and fifty dollars (\$474,950) and the terms of this agreement as to Locomotive shall terminate.

8. Railroad shall have the right to return one or more of the Locomotives to Amtrak at Los Angeles. The Locomotives shall be returned to Amtrak in as good condition as when delivered to Railroad, ordinary wear and tear excepted. All Locomotives shall be returned to Amtrak by October 23, 1983.

9. If default shall be made by Railroad in the observance or performance of any obligation under this agreement and such default shall continue for ten (10) days after written notice from Amtrak specifying the default, Amtrak, at its option may:

(1) proceed by appropriate court action to enforce performance by Railroad or recover damages for breach thereof; or

(2) by notice in writing to the Railroad terminate this agreement, whereupon all rights of the railroad to the use of the Locomotives shall cease and Amtrak may enter the premises where any Locomotives are located and thenceforth possess them free of any right of Railroad to use them. Amtrak shall also have the right to recover from Railroad any damage

and expenses, including reasonable attorneys' fees, which Amtrak shall have sustained by reason of the breach of any covenant of this agreement.

10. The obligation of Amtrak to provide any Locomotives to Railroad hereunder shall be subject to the approvals of Seattle-First National Bank, as trustee, lessor of the Locomotives to Amtrak, the Federal Financing Bank as holder of the conditional sale indebtedness and the federal Railroad Administrator as guarantor. Amtrak shall use its best efforts to obtain such approvals. In the event such approval are not obtained or are rescinded. Railroad agrees upon notice from Amtrak immediately to redeliver the Locomotives to Amtrak. Upon reasonable notice from Amtrak. Railroad also agrees to redeliver to Amtrak any Locomotives which Amtrak requires for use in its operations.

11. This agreement embodies the entire agreement between the parties with respect to the Locomotives and supersedes all prior agreements. It may be amended only by other written agreement. If any provision herein is invalid, it shall be considered deleted herefrom and shall not invalidate the remaining provisions. This agreement shall be governed by and construed in accordance with the laws of the District of Columbia.

12. In the event of a dispute arising under this agreement, which Railroad and Amtrak are not able to resolve within one month after notice pursuant to Section 13 hereof, such dispute shall at the request of Railroad or Amtrak be submitted to binding arbitration which shall be conducted pursuant to the commercial arbitration rules prescribed by the American Arbitration Association in effect on the date hereof, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

13. Any notices required by this agreement shall be in writing and shall be delivered by hand or by deposit in the United States mail addressed as follows:

If to the Railroad:

Vice President—Operations
Southern Pacific Transportation Company
One Market Plaza
San Francisco, California 94105

If to Amtrak:

Anthony Welters
Assistant Vice President
National Railroad Passenger Corporation
400 North Capitol Street, N.W.
Washington, D.C. 20001

14. The obligations of the parties shall be subject to force majeure (which shall include strikes, riots, accidents, Acts of God, or other causes beyond the control of the party claiming such force majeure as an excuse for non-performance), but only as long as, and to the extent that, such force majeure shall prevent performance of such obligations.

15. Railroad shall not transfer or assign this agreement, or any interest therein, or any right granted thereunder, without the written consent of Amtrak, and any such transfer or assignment, whether voluntary, by operation of law, or otherwise, without such written consent, shall be absolutely void and shall, at the option of Amtrak, terminate this agreement.

16. Subject to the provisions of the last preceding paragraph, this agreement shall be binding upon and inure to the benefit of the parties and their respective successors and assigns.

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IN WITNESS WHEREOF, Railroad and Amtrak have caused this agreement to be duly executed by their respective authorized officers as of the day and year first above written.

NATIONAL RAILROAD PASSENGER
CORPORATION

By: o/s

LAWRENCE D. GILSON

10/15/82

SOUTHERN PACIFIC
TRANSPORTATION COMPANY

By: _____

The undersigned certify that they have inspected the units of equipment listed below and have found such units to be in fully operable condition, free of damage (other than normal wear and tear) except as herein specified:

Locomotive
Unit Number

Exceptions to fully operable
condition and damage other
than normal wear and tear

Amtrak Inspector

Southern Pacific
Transportation
Company—Inspector

Date: _____

Date: _____

EXHIBIT B**CALTRANS—SP
LOCOMOTIVE AGREEMENT**

This Agreement, dated as of October 17, 1982, between Department of Transportation, State of California ("Caltrans") and Southern Pacific Transportation Company ("SP"), sets forth certain obligations and responsibilities which Caltrans accepts to permit National Railroad Passenger Corporation ("Amtrak") to furnish locomotives for rail commutation services to be operated by SP for Caltrans between Oxnard and Los Angeles, California.

Pursuant to various orders of the California Public Utilities Commission, SP has been directed to operate rail passenger commutation services over its line between Oxnard and Los Angeles, California. In order to implement such service Caltrans has undertaken to obtain suitable rail passenger coaches and locomotives to be operated on SP's line. Amtrak has advised Caltrans that it has available suitable locomotives which can be leased for the service, but Amtrak has advised Caltrans that the locomotives are subject to equipment trust agreements, whose trustees require that the locomotive leases be executed, not with a non-profit public agency, but rather with SP. As it was and is Caltrans' intention to obtain locomotives for this service, Caltrans proposes that it will advance or reimburse to SP any costs or expenses which SP may be required to pay or to which SP may be subjected by reason of the terms and conditions of the Locomotive Agreement offered by Amtrak. The term "annexed Locomotive Agreement" shall refer to the "Locomotive Agreement" dated as of October 17, 1982, between Amtrak and SP, and which is annexed hereto and incorporated by reference.

Caltrans and SP therefore state:

1. The commutation service for which the locomotives are required is one which has been ordered by the California Public Utilities Commission in various orders

which SP asserts are beyond the jurisdiction of the California Public Utilities Commission. SP is complying with such orders under protest, and proposes to continue to litigate in appropriate judicial forums the existence of the right of the California Public Utilities Commission to direct performance of the subject commutation service. Any subsequent judicial or administrative ruling finding the commutation service to have been unlawfully or improperly ordered into effect shall not relieve either party of responsibility for obligations incurred as a consequence of this Agreement, in which case the rights and obligations hereunder shall be determined as if the commutation service had been regularly ordered into effect by a tribunal of competent jurisdiction.

2. In consideration for the obligations which Caltrans next agrees to undertake, SP agrees to execute the annexed Locomotive Agreement so as to obtain use of the Amtrak locomotive Agreement so as to obtain use of the Amtrak locomotives for the service requested by Caltrans.

3. Caltrans agrees to reimburse SP for all costs, expenses, and monetary obligations imposed on SP by the annexed Locomotive Agreement or directly incurred by SP as a result of the provisions of the annexed Locomotive Agreement. To the extent that the Agreement calls for pay by SP of amounts fixed and calculable in advance, Caltrans shall furnish such funds to SP when such amounts are due and payable from SP to Amtrak.

4. Paragraph 4 of the annexed Locomotive Agreement imposes upon SP the obligation to keep the locomotives in good order, condition and repair, ordinary wear and tear excepted. Caltrans agrees to undertake, on SP's behalf, the obligations of such paragraph, and Caltrans shall, at its sole expense, provide, or arrange to provide, the maintenance and repair obligations of that paragraph. Caltrans shall also undertake, or arrange to have undertaken, such repairs as may be called for under Paragraph 7 of the annexed Locomotive Agreement, pertaining to loss, theft, damage or destruction.

5. Caltrans agrees that it will not request or require SP to act in any manner (or refrain from acting) contrary to the provisions or requirements of the annexed Locomotive agreement.

IN WITNESS WHEREOF, Caltrans and SP have caused this Agreement to be duly executed by their respective authorized officers as of the day and year first above written.

DEPARTMENT OF
TRANSPORTATION,
STATE OF CALIFORNIA

SOUTHERN PACIFIC
TRANSPORTATION
COMPANY

By _____ By _____

Decision 83-02-079

February 17, 1983

**BEFORE THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA**

DEPARTMENT OF TRANSPORTATION,
STATE OF CALIFORNIA,
Complainant,

v

SOUTHERN PACIFIC TRANSPORTATION
COMPANY, a corporation
Defendant.

Case 82-08-01
(Filed
August 4, 1982)

(For appearances see Decisions 82-10-031 and 82-11-032.)

Additional Appearances

Edward J. Connor, Jr., Attorney at Law, for
California Department of Transportation,
complainant.

Brobeck, Phleger & Harrison, by *Malcolm T.
Dungan* and Thomas M. Peterson, Attorneys
at Law, for Southern Pacific Transportation
Company, defendant.

OPINION

On February 11, 1983, the California Public Utilities Commission (Commission) issued Decision (D.) 83-02-038 ordering Southern Pacific Transportation Company (SP) to appear on February 15, 1983 and show cause why SP; D. K. McNear, Chairman of SP; R. D. Krebs, SP; W. J. Lacy, Vice President of SP; or such other officer of SP under whose direction and control the commuter rail transportation service

between Oxnard and Los Angeles ceased on February 7 and 8, 1983 should not be adjudged in contempt of this Commission for violation of the orders contained in D.82-10-041. SP was ordered to make available McNear, Krebs, Lacy, or such other officer of SP under whose direction and control the service ceased on February 7 and 8, 1983 to answer under oath questions concerning the discontinuance.

A copy of D.83-02-038 and a true copy of the affidavit of Harvey Morris of the Commission's Legal Division, and a copy of the SP press release dated February 4, 1983 were personally served on John J. Corrigan, General Solicitor for McNear, and on E. A. Flammengo (Fiammengo), an officer of and statutory agent for SP. The certificates of service were received as Exhibits 53 and 54.

The orders contained in D.82-10-041 are as follows:

1. SP was ordered to operate a commuter rail transportation service between Oxnard and Los Angeles with intermediate stops at various communities (the service) beginning on October 18, 1982 on the schedule tendered by SP on October 17, 1982 using the passenger equipment furnished by California Department of Transportation (Caltrans).
2. SP was ordered to execute a "Locomotive Agreement" and a related "Reimbursement Agreement" (copies of which were attached to the decision).
3. Caltrans was given the right of immediate entry to SP property and SP was ordered to make the property available, to construct station and parking facilities at Northridge, Moorpark, Camarillo, Burbank, Burbank Airport, and Chatsworth in accordance with plans on file with the Commission.

SP has testified that it did not operate passenger train service between Oxnard and Los Angeles on February 7 and 8, 1983. SP's counsel stipulated that SP did not request any authority or permission from the Commission prior to the suspension of operations of February 7 or 8, 1983. There is no factual question, then, that SP failed to operate the service as

ordered by the Commission on two separate days. The schedule tendered by SP on October 17, 1982 is marked Exhibit 45 in this proceeding and shows two morning trains and two evening trains for a total of eight trains that did not operate over the two-day period. The remaining question is a legal one—did this Commission have jurisdiction to require SP to operate the service? SP contends that this Commission has no jurisdiction over the subject matter of this proceeding. It bases this contention on four things:

1. That under the Staggers Rail Act of 1980 (49 U.S.C. § 11501 et seq.) (Staggers Act) jurisdiction over intrastate rail transportation of the State of California and its agency, this Commission, ceased.

2. That the Interstate Commerce Commission (ICC) declared officially that this Commission has lost all jurisdiction over intrastate rail transportation in the State of California.

3. That the ICC, by order of May 4, 1982, effective May 11, 1982, assumed jurisdiction over the very subject matter of this proceeding, to the exclusion of the power of the State of California.

4. That SP, in compliance with federal law, filed its tariff with the ICC which did not suspend and did not investigate that tariff which became effective, and is now the measure of SP's rights with respect to intrastate rail transportation. The only body with jurisdiction to declare that tariff unlawful is the ICC.

SP concluded its opening statement by urging the Commission to exercise its jurisdiction and therefore to terminate this proceeding. The motion was taken under submission.

Caltrans takes the position that this Commission has dealt with the Staggers Act since its enactment in 1980, has considered SP's arguments, and rejected them. Further, Caltrans notes that the California Supreme Court has considered and rejected SP's arguments concerning federal preemption. SP then went into Federal District Court, which court concluded that the California Supreme Court's decision is *res judicata*.

Caltrans contends that the tariff filings with the ICC are preliminary and that they are still subject to challenge and attack and that in any event, no action has been taken by any court which would stay the hand and the authority of this Commission.

The Commission staff (staff) also argues that the arguments of SP relating to the Staggers Act and various acts of the ICC is simply an attempt to raise federal preemption and supremacy argument that have been unsuccessful in the past. Staff too points out that the California Supreme Court on two separate occasions denied SP's petition for review of Commission decisions which is a finding on the merits of those decisions. Staff also points to the federal judgment from the United States District Court for Northern California stating that SP is barred from raising federal supremacy before that court since the California Supreme Court decision was final and intact and since the federal constitutional arguments were or could have been raised in that forum.

SP's arguments concerning jurisdiction are a smoke screen behind which it seeks to hide its outright willful violation of a lawful, final order of this Commission. The proper time for SP to have asserted its Staggers Act preemption arguments was in petition for rehearing or petition for writ of review by the California Supreme Court of decisions of this Commission asserting jurisdiction to order SP to conduct this service. The judgment of the United States District Court for the Northern District of California dated August 9, 1982, of which we take official notice, recognizes that fact and the fact that SP did raise those arguments in its petition to the California Supreme Court. Review was denied by the California Supreme Court which is a judgment on the merits. The Commission has the jurisdiction confirmed by the Court to order that the service be operated. Appeal to the United States Supreme Court of the decision of the California Supreme Court's decision was available to SP under 28 U.S.C. § 1257. That appeal was not taken, and SP is nor barred from asserting to us that we lack jurisdiction because of Staggers Act preemption.

SP's arguments that the filing and acceptance of a tariff with the ICC removes jurisdiction from this Commission to enforce its lawful orders likewise will not stand. SP has cited no authority for the proposition that the filing of a tariff with the ICC divests this Commission from jurisdiction to enforce its lawful order to a railroad common carrier to provide intrastate train service. SP is free to enter any other forum than this to make precisely this argument, and indeed it apparently has, to no avail. SP simply fails to recognize that once our assertion of jurisdiction has been confirmed by the Supreme Court of this State, that jurisdiction continues until set aside by superior authority. That has not occurred as of February 7 and 8, 1983 nor has it to date.

SP's single witness in response to our Order to Show Cause, William Weber, is an Executive Assistant, Executive Department. His counsel identifies him as an officer of the company although in what sense is unclear since he does not know whether he is an officer under the articles of incorporation or the bylaws of the corporation. He testified that he informed the operating personnel not to operate the train service known as Caltrain on February 7 and 8, 1983. SP's counsel stipulated that SP did not request any authority or permission from the Commission prior to the suspension of operations on February 7 and 8, 1983.

The evidence required to prove a contempt is dependent upon the nature of the contempt. Acts which are committed beyond the physical present of the tribunal are constructive contempts. SP's failure to operate service between Los Angeles and Oxnard on February 7 and 8, 1983 is a constructive contempt. California Code of Civil Procedure § 1211 requires that prosecutions for constructive contempts be commenced upon the filing of an affidavit setting forth the facts constituting the contempt. That affidavit was prepared by Harvey Y. Morris and is attached to the Order to Show Cause in re Contempt. The Commission takes official notice of its own order D.82-10-041 requiring the service and of its own records which establish that service of the order in D.82-10-041 was made on SP. SP did not allege any inability to comply with the order as a

defense and it voluntarily admitted suspending the service. These facts are sufficient to establish contempt, and we will so find.

In the matter of a penalty for contempt, staff urges imposition of a fine of \$2,000 for each offense as provided by Public Utilities (PU) Code § 2107. Staff notes that four trains per day between Oxnard and Los Angeles are required by the schedule filed by SP. Staff believes that the intentional failure to operate each train required by the schedule for the two days SP did not operate constitutes separate and distinguishable offenses for which SP should be fined. Staff argues that to do otherwise could induce utilities committing a contempt to "offend to the maximum" since the penalty for failure to run four trains would then be no greater than the failure to run a single train. Caltrans did not address the matter of a penalty.

Although specifically invited to do so, SP did not address either the matter of a penalty or the issue of mitigation should the Commission find it in contempt. Instead, in a section of its written argument captioned "Penalties and Mitigation" it reiterates its arguments about lack of jurisdiction. It closes by stating that it incurred serious losses from its overall rail operations in 1982 and cannot afford to support losing services. We fail to see how this even addresses the issue and conclude that SP either could not or was insufficiently interested in presenting any case in mitigation.

We will adopt the staff recommendation and will impose the maximum penalty of \$2,000 for each train required by the schedule on file with the Commission which did not run on February 7 and 8, 1983. The penalty will be \$16,000.

Further, this Commission expects SP to continue to operate passenger train service between Oxnard and Los Angeles until we issue a formal order authorizing suspension or discontinuance of the train service. Failure to render service without authorization to suspend or discontinue operations will be considered further contemptuous actions punishable under the PU Code.

Caltrans has filed a statement, received as Exhibit 51 in this proceeding, which raises the question whether it would be

in the public interest to continue the service while major issues such as provision of equipment and funding of the service remain unresolved. This matter will be reopened to take evidence and testimony on the issues raised in Exhibit 51 before Administrative Law Judge John Mallory on Monday, February 28, 1983. Should SP desire to discontinue or suspend service prior to our decision after hearing in this reopened proceeding, it may file an emergency petition to do so and it will receive our prompt consideration.

We recognize that a dispute exists about the amount of the subsidy owed by Caltrans to SP to provide the service. It further appears that Caltrans no longer enthusiastically supports the service. This order provides for further hearings on February 28 to consider the implications of Caltrans position.

It should be understood that our action today does not deal with the merits or demerits of the subsidy issue. Rather it concerns a single, basic foundation of utility regulation. When a utility wishes to discontinue service it has been ordered to provide, the utility may not, under the law, unilaterally suspend the service without prior approval by this Commission. We do not impose today's penalty lightly or with any sense of satisfaction; but we do so because we would be derelict in our duty were we not to enforce so fundamental a principle of utility regulation.

This matter is not listed on the public agenda as required by PU Code § 308; however, an emergency exists which justifies our consideration of this matter without public agenda notice. Specifically SP is currently under a temporary restraining order (TRO) granted by Federal District Court Judge T. E. Henderson (C83 0581 TEH) requiring the continued provision of service between Oxnard and Los Angeles pending argument on Tuesday, February 22, 1983, at which time the TRO may be lifted by the federal court. SP is entitled to know that its unilateral suspension of service without authorization from this Commission in violation of an order of this Commission is an act of contempt which we view most seriously. Accordingly, we are acting now, without public agenda notice, so that SP will know what it faces for the future should it again decide not to operate the service required by D.82-10-041.

To ensure that the Oxnard to Los Angeles commuter rail transportation service continues without further unauthorized interruption, this order should be effective when it is signed.

Findings of Fact

1. D.82-10-041 ordered SP to operate commuter rail transportation service between Oxnard and Los Angeles beginning on October 18, 1982 on the schedule filed by SP on October 17, 1982, using the passenger equipment furnished by Caltrans.

2. SP began operating the service on October 18, 1982 and continued thereafter to operate it according to the schedule on file with the Commission.

3. On Monday, February 7, and on Tuesday, February 8, 1983, SP admits that it did not operate the service.

4. SP has not alleged any inability to provide the service required by D.82-10-041.

5. The schedule filed by SP on October 17, 1982 provides for four trains per day to operate between Oxnard and Los Angeles.

6. Each failure to run a scheduled train is a separate contempt.

7. A total of eight trains were not operated as required by D.82-10-041.

8. PU Code § 2107 provides for a maximum fine of \$2,000 for each separate offense.

9. No evidence, testimony, or argument has been offered in mitigation of SP's failure to operate the service on February 7 and 8, 1983.

Conclusions of Law

1. SP should be held in contempt for failure to operate eight trains over the period February 7 and 8, 1983.

2. SP should be fined in the maximum amount for each separate offense.

3. This matter should be reopened to address issues raised by Caltrans in Exhibit 51.

ORDER

Therefore, IT IS ORDERED that:

1. Southern Pacific Transportation Company (SP); D. K. McNear, Chairman of SP; and William Weber, officer of SP, are adjudged in contempt of this Commission for violation of the orders contained in D.82-10-041 on eight separate occasions on February 7 and 8, 1983.

2. SP, McNear, and Weber are fined \$2,000 for each offense under the provisions of Public Utilities Code § 2107, for a total fine of \$16,000.

3. SP shall continue to provide commuter rail service between Oxnard and Los Angeles as ordered in D.82-10-041 until authorized by further order of this Commission to suspend or discontinue the service.

4. This proceeding is reopened for the purpose of taking evidence and testimony on the issues raised in Exhibit 51. Hearing on these issues will be before Administrative Law Judge John Mallory, Commission Courtroom, 350 McAllister Street, San Francisco 94102, on Monday, February 28, 1983, at 10 a.m.

This order is effective today.

Dated February 17, 1983, at San Francisco, California.

LEONARD M. GRIMES, JR.

President

VICTOR CALVO

DONALD VIAL

Commissioners

Commissioner Priscilla C. Grew, being necessarily absent, did not participate.

Decision 83-03-027

March 11, 1983

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

DEPARTMENT OF TRANSPORTATION,
STATE OF CALIFORNIA,
Complainant,

vs

SOUTHERN PACIFIC TRANSPORTATION
COMPANY, a corporation,
Defendant.

Case 82-08-01
(Filed
August 4, 1982)

(For appearances see Decisions 82-10-031,
82-11-032, and 83-02-079.)

Additional Appearances

Messrs. Buchalter, Nemer, Felds, Chrystie, &
Younger, by *Douglas Ring*, Attorney at Law,
for Simi Valley, Oxnard, County of Ventura,
interested Party.

Richard Bower, Attorney at Law, for Cal-
trans, Complainant.

INTERIM OPINION

Summary of Decision

We authorize Southern Pacific Transportation Company (SP) to temporarily suspend operations of the rail passenger service between Los Angeles and Oxnard (Caltrains) which was established under our direction in Decision (D.) 82-10-041. We will continue to assert our jurisdiction over resolution of the issues that will permit restoration of the service.

Suspension is ordered because the California Department of Transportation (Caltrans) no longer wishes to sponsor the Caltrains operations under the terms and conditions they advocated at the time of service implementation. Present circumstances have precluded reaching an agreement with SP on the amount of public subsidy required for operations and on related public liability and equipment issues. Caltrans is uncertain whether funding provided to it to subsidize Caltrains is sufficient either to meet incurred liabilities or support any continued operations. The Governor's budget before the Legislature does not provide for any additional funding of Caltrains and the California Transportation Commission (CTC) has recommended to the Legislature that no additional funding be allocated for Caltrains for this and next fiscal year. Caltrans has been unable to locate and place in service adequate locomotives and commuter rail cars, and the problem continues to hamper the service. Caltrans believes that the problems associated with the operation of the service have undermined the demonstration goals for which it was initiated.

SP supported the suspension of the service while asserting throughout the proceeding that the amount of public support required for operations has been established in the tariff filed by SP with the Interstate Commerce Commission (ICC). SP questions the adequacy of available funds for continued support of the service. It is concerned about the inadequacies of the equipment used in the Caltrains operations and it desires to remove the asserted impediments to its freight operations created by operation of Caltrains over its single track line between Los Angeles and Oxnard.

No immediate alternative public funding appears to be available to continue operations at this time, nor does there appear to be an alternative public agency willing to undertake the role of sponsor under the terms and conditions under which Caltrans initiated the service. Supporters of continuance contend that potential alternative funding providers must have reliable information on the amount of subsidy required before support can be considered. The Commission reserves the right to

consider in supplemental proceedings, the level of public subsidy and related conditions reasonably required to support the past and potential future operations of Caltrains.

During the period of suspension, SP is directed not to remove or modify the platforms, passenger and parking facilities at Moorpark, Chatsworth, Panorama City, Burbank Airport, and Simi Valley stations pending further order of this Commission.

Background

SP commenced operation of Caltrains on October 18, 1982 under the orders in D.82-10-041, as follows:

1. SP was ordered to operate a commuter rail transportation between Oxnard and Los Angeles with intermediate stops at various communities (the service) beginning on October 18, 1982 on the schedule tendered by SP on October 17, 1982 using the passenger equipment furnished by Caltrans.

2. SP was ordered to execute a "Locomotive Agreement" and a related "Reimbursement Agreement" (copies of which were attached to the decision).

3. Caltrans was given the right of immediate entry to SP property and SP was ordered to make the property available, to construct station and parking facilities at Northridge, Moorpark, Camarillo, Burbank, Burbank Airport, and Chatsworth in accordance with plans on file with the Commission.

Service was started with rail cars and engines leased from Amtrak by Caltrans pursuant to Caltrans' request. The Amtrak rail cars were unsuitable for commuter service and they were replaced by commuter rail cars leased by Caltrans from the Chicago Regional Transit Authority (RTA). As Amtrak P-30 engines used to pull the RTA cars assertedly caused derailments at several points on SP's systems, the P-30 engines were removed from service by SP on November 26, 1982.

Caltrans immediately entered into an agreement with SP to replace the P-30 engines with engines used on SP's Peninsula rail commuter service, which is subsidized by Caltrans. As the

RTA cars cannot be used with the replacement engines, use of the RTA cars cannot be used with the replacement engines, use of the RTA cars was discontinued, and five gallery cars leased by Caltrans from SP for Peninsula commute service were transferred to the Los Angeles-Oxnard Service.

On November 5, 1982 Caltrans filed a petition for modification of D.82-10-041 to provide for a right-of-entry at Oxnard Station to construct parking facilities and to establish a time for concluding negotiations on and for submitting a subsidy agreement. On December 9, 1982 Caltrans filed a motion for orders further clarifying and implementing prior Commission decisions. Hearings on these matters were held on December 20, 1982, and on January 4 and 5, 1983. These matters were submitted subject to filing proposed findings of fact and conclusions of law, which were received from Caltrans and SP. No decisions have been issued on these matters.

SP filed a tariff with this Commission covering costs to be assessed for operation of the Los Angeles-Oxnard service. Subsequently it filed a similar tariff with the Interstate Commerce Commission (ICC) which contains charges for operation of the Los Angeles-Oxnard service of \$588,200 per month. Caltrans was unable to obtain an order from the ICC suspending the tariff. Caltrans' petition to reopen the suspension proceeding was denied by the ICC on January 17, 1983. Caltrans intends to file a formal complaint with the ICC. SP contends that the acceptance of its tariff by the ICC removes this Commission's jurisdiction to adjudicate the issues concerning reasonable subsidy levels, and that Caltrans must pursue these issues before the ICC.

D.83-02-079 dated February 17, 1983 in this proceeding adjudged SP to be in contempt of this Commission for violation of D.82-10-041 for failure to operate the commuter train service between Los Angeles and Oxnard on February 7 and 8, 1983. That decision fined SP and certain named officers of SP for violation of the orders in D.82-10-041, and directed SP to continue to provide commuter rail service between Oxnard and Los Angeles as ordered in D.82-10-041 until authorized to discontinue by further order of the Commission.

Caltrans filed a statement in the contempt action, received as Exhibit 51, which raised the question whether it would be in the public interest to continue the service while major issues such as provision of equipment and funding of the service remain unresolved. This matter was reopened to take evidence and testimony on the issues raised in Exhibit 51 on February 28, 1983. D.83-02-079 stated that should SP desire to discontinue or suspend service prior to our decision after hearing in the reopened proceeding, it may file an emergency petition to do so and it will receive our prompt consideration. That decision also stated that we recognize that a dispute exists about the amount of the subsidy owed by Caltrans to SP to provide the service, that it appears that Caltrans no longer enthusiastically supports the service, and that the implications of Caltrans' position would be considered at the further hearings on February 28.

On February 22, 1983, a temporary restraining order (TRO) granted by the Federal District Court (C83 0581 TEH) requiring continued provision of service by SP between Oxnard and Los Angeles was lifted and the proceeding dismissed for lack of federal jurisdiction. That court indicated that jurisdiction over SP's commute operations lies with the State of California, in particular the California Public Utilities Commission.

On February 22, 1983, Caltrans filed a motion for suspension of service, and SP filed a petition for an emergency order vacating Ordering Paragraph 1 of D.82-10-041 and authorizing suspension of service.

Caltrans stated in its motion that allocated subsidy funds may be depleted, assuming the ICC tariff is ultimately sustained, and that further subsidy funding appears unlikely at this time; therefore, it is not in the position to guarantee further State funds for subsidy of the commuter service. Caltrans further stated that it has concluded that it should not continue to be responsible for subsidizing deficits associated with the commute service until costs can be ascertained and that Caltrans can no longer undertake the responsibility for providing rolling stock.

Caltrans requests the Commission to:

1. Take immediate action to order suspension of the service,
2. Issue such order as is appropriate to protect and preserve the station sites and parking facilities, and
3. Take such action as is necessary to expedite the hearing on subsidy issues.

SP argued in its petition that funds do not exist under current State budgetary constraints to adequately fund the train service; and that Caltrans underestimated the amount of the subsidy necessary to provide the service and that subsidy funds already appropriated are exhausted. SP states that Caltrans' Exhibit 51 introduced in the hearing preceding the issuance of D.83-02-079 confirms these facts. SP states that its obligation to run the trains was conditioned upon subsidization by Caltrans with no burden on SP. As no funds exist for continued subsidization, SP asks that the Commission issue an emergency order suspending the service.

An Administrative Law Judge's (ALJ) Ruling issued February 24, 1983, determined that the evidence to be adduced at the hearing scheduled for February 28, would deal with the ability of Caltrans to provide subsidy funds beyond February 28, 1983, and other issues raised in Caltrans' Exhibit 51.

A further hearing was scheduled March 7, 1983 in Los Angeles to receive evidence from public bodies other than Caltrans concerning their ability to provide future subsidy funding of the Oxnard-Los Angeles rail commute service, including liability for injury, loss or damage resulting from operation of the service. The ALJ ruling stated that there was no need to produce evidence concerning need for the service as the Commission has found in D.91847 and other decisions that public convenience and necessity require the service. The ruling was served on all known public bodies which may be interested in the continued operation of the rail commute service. All were requested to appear at the Los Angeles hearing and to advise the Commission of the present availability of subsidy funds for the continued operation of the service.

Public Hearings

At the public hearing on February 28 held before Commissioner Vial and ALJ Mallory in San Francisco evidence was adduced on behalf of Caltrans, SP and Southern California Association of Governments (SCAG).

At the hearing held before Commissioner Vial and ALJ Mallory in Los Angeles on March 7, testimony was received from Caltrans and SP concerning a discontinuance of Caltrans operations on Wednesday, March 2, because of a collapsed railroad trestle resulting from storm damage. The trestle was expected to be repaired and operations resumed on or about March 14. Testimony was also received from Rick Richmond, Executive Director of the Los Angeles County Transportation Commission (LACTC). Statements of position were made on behalf of the County of Ventura, Assemblywoman Cathie Wright (Thirty-seventh Assembly District), Senator Ed Davis (Nineteenth Senate District), and by Robert J. Swan, a member of the public.

The testimony of Caltrans was presented through three witnesses: Glen Rome, Chief of Caltrans' Office of Financial Control; Warren Weber, Chief of the Office of Rail Services in Caltrans' Division of Mass Transportation; and Elmer Hall, Chief of the Rail Operations Maintenance-of-Way and Facilities Branch.

Mr. Rome presented Exhibit 56, which is a comparison of the funds available for subsidy of SP's Los Angeles-Oxnard commute operation with Caltrans' estimates of the costs to date of operating the service, and with the charges to date under SP's tariffs. Capital costs expended by Caltrans for construction of station and parking facilities are not included. The witness explained in detail the assumptions made in connection with Caltrans' estimates of net expenditures.

The following table is a summary of the data contained in Exhibit 56.

TABLE 1

**DEPARTMENT OF TRANSPORTATION
FINANCIAL STATUS REPORT ON THE
LOS ANGELES-OXNARD COMMUTE SERVICE
AS OF FEBRUARY 28, 1983
(Exhibit 56)**

Authorized Funds—Operations

Chapter 161/79, Section 7(c)(2)(A), Transportation Planning and Development Account (Held in a Special Deposit Fund Account)	\$1,000,000
1982-83 Budget Act, Item No. 2660-001-046, Transportation Planning and Development Account CTC Resolution No. MT-83-11 and 13	<u>2,400,000</u>
Total	\$3,400,000

<u>Less:</u>	<u>Caltrans</u>	<u>SP</u>
Estimated net expenditures through 2/28/83	<u>\$ 847,320</u>	<u>\$3,530,470</u>
Estimated balance or (deficit)	\$2,552,860	\$ (130,470)

According to the witness, payments totaling \$111,000 have been made to date by Caltrans to SP. Other items recognized as due and payable assertedly have not been paid by Caltrans because adequate billing by SP has not been furnished.

The witness testified that if it is assumed that SP's ICC tariff charges are ultimately determined to apply, the expenditures through February 28 exceed the available funds by \$130,470. Caltrans is not seeking additional funds for operation of the Los Angeles-Oxnard commute service, and the proposed Governor's budget for the 1983-84 fiscal year does not provide for them.

On the other hand, if Caltrans' lesser estimates of operating expenditures ultimately are determined to be correct, there remained on February 28 an unspent balance of authorized funds of \$2,552,860. The funding under California Transportation Commission (CTC) Resolutions MT-83-11 and 13 is available through June 30, 1985.

Mr. Weber testified that Caltrans was originally proposed as a 3-year demonstration project using 11 stations. Los Angeles-Oxnard was one of several corridors in the Los Angeles metropolitan area identified to serve as a demonstration project to ascertain whether travelers would make a choice to leave their cars and ride a commuter rail service. With all stations open, and with the operation of two round trips daily, Caltrans estimated a ridership of 2,600 persons per day. At the present time eight stations are open. Ridership has approximated 360 to 400 persons per day.

Mr. Weber testified that in Caltrans' estimation the service as presently running has not met its initial goals. One factor that has caused ridership to remain low, in Weber's view, has been widespread publicity of the operational and institutional problems which have occurred. Such problems include the frequent substitution of equipment, the disputes between SP and Caltrans concerning train operation and subsidies, and discontinuance of operations for short periods of time. Weber also stated that the trains were operated in an unprofessional manner by SP in that trains were often as much as an hour late and conductors were not required to be in uniform.

Weber testified that Caltrans' inability to obtain and retain proper and adequate equipment is also a major consideration in Caltrans' decision to seek suspension of operations. Equipment suitable to the operations has been sought in a nationwide search, but none is available for acquisition by Caltrans. At present the Los Angeles-Oxnard service is operated with five gallery cars and three locomotives temporarily transferred from the Peninsula commute service. These cars are not being adequately maintained by Amtrak in Los Angeles, and several cars have been out of service for long periods of time. The Peninsula gallery cars are needed for that service, and must be returned to that service in the near future. Because of its

inability to acquire suitable rail cars and locomotives, Caltrans proposed that if the Los Angeles-Oxnard service continues to operate, SP should be required to provide the necessary equipment rather than Caltrans.

In summary, Weber stated that Caltrans' decision to seek suspension was predicated on three factors: the instability of the operation which caused low ridership, Caltrans' inability to secure adequate equipment, and Caltrans' unknown liability for operations conducted to date.

Witness Hall described in detail the reasons for the five equipment changes made in the Los Angeles-Oxnard service, the difficulties encountered obtaining adequate maintenance of the equipment currently used, and the poor state of that equipment. Hall concluded the Los Angeles-Oxnard service could not be adequately performed with equipment now available, and no arrangements can be made for needed replacement of that equipment.

SP presented evidence in support of its request for an emergency order suspending the Los Angeles-Oxnard commute service. The first point raised by SP is the level of accrued subsidy payments and the impact on SP of the dispute between it and Caltrans over payments for past services. SP stated that it operated at a loss in 1982. SP contends that continued operation of the Los Angeles-Oxnard commute service adversely affects its financial position particularly since only minimal subsidy payments have been made by Caltrans to date. SP also contends that commute operations over the single track line between Oxnard and Los Angeles are an impediment to its freight operations over the line, thus reducing earnings from freight service. Both these contentions were raised by SP in the initial phases of this proceeding.

SP further contends that neither Ventura County or Los Angeles County, the two counties in which Caltrans operates, will agree to fund the operation of Caltrans; Caltrans is no longer able or willing to fund Caltrans; and this Commission has indicated in prior decisions that SP would not be required to subsidize Caltrans from freight operations. Therefore, the only alternative available at this time is to order immediate suspension of the service.

SP believes it is legally obligated to pursue collection from Caltrans of the amounts set forth in the ICC tariff and, if Caltrans does not voluntarily pay, to institute appropriate collection actions in court. SP also believes that it is impossible for both the ICC and this Commission to have concurrent jurisdiction over the question of compensation due from Caltrans, and that the ICC, being a federal agency and having exercised its jurisdiction, is the superior agency under federal law.

SP argued for immediate cessation of operations because risk of harm to third parties and property should have been assumed by Caltrans through an insurance policy, and Caltrans has not obtained such a policy. Caltrans contends D.91847 did not require it to obtain such an insurance policy.

Finally, SP states that the service should be suspended because of equipment problems. Caltrans is responsible for obtaining the rail cars and locomotives used on the Los Angeles-Oxnard route. The SP witness testified as follows with respect to equipment problems:

"The initial equipment obtained by Caltrans for this service consisted of Amtrak P30CH locomotives and Amtrak passenger cars, later replaced with RTA passenger cars. What neither SP nor Caltrans anticipated at that time was that the Amtrak P30CH locomotives would prove to be too heavy, and too stiff, for the light support trackage in the Oxnard yard and at the Montalvo WYE where the train sets were turned each evening. On an emergency, interim basis, SP and Caltrans agreed upon the use of five cars from the San Francisco peninsula commutation service, and three SP locomotives which had been used as backup for the requirements of the Peninsula service, and moved that equipment to Oxnard. Meanwhile, the RTA recalled the equipment which had been leased to Caltrans, and that is no longer available to SP. Likewise, Caltrans has directed that the P30CH locomotives be released and turned back to Amtrak, so as to avoid the rental expense of units which cannot be used.

"SP cannot, however, rely on the borrowed cars from the Peninsula commute fleet to continue in the Oxnard service. They were specifically designed for the climatic conditions

on the San Francisco peninsula, and their air conditioning systems are relatively low powered, not equipped to cope with the thermal load generated from cars sitting out in the sun at Los Angeles all day.

"The maintenance forces familiar with the Peninsula cars, and which has available to it the stock of spare parts, are located in San Francisco, San Jose and Oakland, but not Los Angeles. SP does not have passenger coach yard service and maintenance facilities at Los Angeles.

"The problems involved in maintaining this equipment at Los Angeles are illustrated by the current situation. When SP suspended service February 7 and 8 the commuter cars were moved to San Francisco for long-overdue servicing. Only two of the five cars had been serviced when operations resumed. Those two cars plus three more from the Peninsula Fleet, were sent to Oxnard. Within two weeks three of those cars had been taken out of service for repairs. On two days recently, each Los Angeles-Oxnard commute train operated with one car because three of the five commute cars borrowed from the Peninsula service have been inoperable for one reason or another. Presently, one train is operating with one car and one train operates with two cars. In effect, there now is no reserve car available if there are further car failures. One car was out of service because the diesel generator failed. The air-conditioning, lights, and overhead electric heating are powered by this diesel generator. Another car was removed from service because of shelled wheels, defective grease shells and swing hangers rubbing against the truck. The third car also experienced wheel and truck problems. Since these cars were shipped to Los Angeles in late November, Amtrak has turned 14 pairs of wheels. Typically, 14 pairs of wheels is what SP would turn in a year for the entire Peninsula commute fleet. In addition, SP shipped two pairs of wheels to Los Angeles for changeout. SP contends that the maintenance problems described above, including the extent to which the cars have been removed from service, dramatically indicate the need to promptly return this equipment to the Peninsula commute service for repair."

On February 24, 1983, CTC passed Resolution MT-83-18 (Exhibit 59), which contains the following recommendations to the Legislature concerning the Los Angeles-Oxnard commute operations:

"RESOLVED, that the California Transportation Commission has reviewed the Department's 1983 Rail Passenger Development Plan and, pursuant to Section 14036 of the Government Code, gives the following advice:

"Because of the Oxnard Commute Service's very low ridership, its poor farebox performance, and the continued uncertainty about costs, the Commission recommends that the Legislature not appropriate any additional funds for the service in the current year, or in the State Budget for 1983/84."

Assembly Bill 2523 requires Caltrans to submit a rail passenger development plan to CTC for its advice and consent and, after CTC's review, to submit the plan by March 1 to the Legislature, the Governor, and the Public Utilities Commission. The purpose of the plan is to provide the basic information needed to evaluate the passenger rail program during the annual deliberations on the State Budget.

The comments and recommendations of CTC's staff, as set forth in an attachment to Resolution MT-83-18, are as follows:

"Whether or not it qualifies as an exotic mode of transportation, the Oxnard Commute service certainly is one whose price is exorbitant and performance poor. The plan indicates that ridership over the first eleven weeks of the service averaged about 300 passengers a day, about 25% of projections for the original five station service, and 11.5% of the 2600 the eleven station service was to have achieved. The plan indicates that the farebox will provide only 10% of operating costs, well below the 35% projection in last year's plan, and the 40% level the service must achieve, by statute, within three years.

"The service began after a protracted and bitter legal dispute between Caltrans and the Southern Pacific, and has since endured several changes in operating equipment.

the opening of two more stations, and a continuing argument over the costs of the service that prompted the Southern Pacific to unilaterally cancel the service for two days on February 7-8, 1983. The Commission supported the funding of this service in the current Budget, *as a demonstration project*. It allocated \$6 million to the service in October with considerable reluctance because estimated costs of starting the service skyrocketed from \$4.9 million to \$8.4—\$17.1 million in less than a year. The Commission was particularly concerned about the uncertainty of the cost of operating the service. Caltrans claimed the amount of operating subsidies should be \$495,000, while the Southern Pacific claimed 'realistic compensation estimates should be in the \$5 million annual range.'

"Because of the service's very low ridership, its poor farebox performance, and the continued uncertainty about costs, with the risks that creates, the Commission recommends that the Legislature not appropriate any additional funds for the service in the current year, or in the State Budget for 1983/84."

Rick Richmond testifying on behalf of LACTC indicated the following: LACTC has supported the Los Angeles-Oxnard service in the past on the understanding that it was to be operated for a demonstration period to determine its success and desirability as a part of LACTC's overall transportation strategy, and on the understanding that the service was to be state funded.

LACTC has not taken a position on whether the service should be continued with state funding beyond the original demonstration, or with local resources. It has, however, encouraged Caltrans to pursue its efforts to achieve a fair and reasonable charge from SP for operating this service.

LACTC further stated that the only feasible source of potential local funding is the Los Angeles County ½% transit sales tax which went into effect in July 1982. LACTC placed this issue on the ballot in 1980 and is responsible for administering it under the terms of a Los Angeles County ordinance adopted at that time. Part of the program for use of the funds is the construction of a rail transit system which appeared on the

ballot (Exhibit 65). For local sales tax funds to be expended on the Los Angeles-Oxnard service, three basic determinations would have to be made: First, whether providing operation subsidies for that service is consistent with the system corridors approved by the voters; second, the priority for that corridor relative to other corridors in the countywide network; and third, the desirability of subsidizing the operation of that particular service over construction of alternative routes serving the same corridor.

LACTC has begun the process for determining priorities for the countywide rail transit system. An initial screening of all alternatives should be done this spring and a strategic plan for implementing specific routes should be adopted by late this year.

LACTC staff would need approximately three to six months to prepare an analysis of the Los Angeles-Oxnard corridor to determine whether the staff would recommend funding of the Los Angeles-Oxnard rail commuter service, or would recommend a different rail transit operation in that corridor.

LACTC has expressed the relative priority of this service in connection with two other funding programs: the development of a State transit guideway program by CTC and the proposed fiscal year 1984 State Transportation Budget. First, in transmitting county priorities for the State Transit Guideway Program, the LACTC has placed top priority on the use of available State funds on the Wilshire Metro Rail Line and the Los Angeles-Long Beach Rail Transit Project, both of which will serve high priority local transit needs. Second, in seeking modification to the proposed State Transportation Budget for the coming year, LACTC has placed relative priorities for restoration of proposed funding cuts as follows:

1. State transit guideway funding (for Wilshire Metro Rail Construction).
2. State Transit assistance (primarily for bus operating assistance).
3. Ridesharing support.

4. Commuter/Intercity rail.
 - a. Los Angeles-Oxnard commuter rail service.
 - b. Other commuter/intercity services proposed for elimination.

Discussion

Based on all the evidence we conclude that the present Los Angeles-Oxnard commute service should be immediately suspended because of inadequate equipment and lack of funding. This is without prejudice to restoration of the service at some future date should adequate public funding become available.

Equipment

It is clear that despite Caltrans' extensive efforts to secure adequate equipment for the Los Angeles-Oxnard commute service, it has been unable to do so. It is also clear that equipment now in use, which has been borrowed from SP's Peninsula commute service is unsatisfactory for continued adequate, safe, and comfortable operation of the Los Angeles-Oxnard commute service. The fact that adequate equipment currently cannot be made available by Caltrans is further supportive of our order to suspend the service. In evaluating a request for restoration of service, we would consider requiring SP to provide equipment, as we originally ordered in D.91847.

Funding by Caltrans

Additional state funding for the Los Angeles-Oxnard commute service does not appear to be forthcoming. The Governor's Budget for 1983-84 provides no additional funds, Caltrans seeks no additional funds, and CTC recommends that no additional state-provided funding be made in the current fiscal year or in subsequent periods.

Caltrans submitted in Exhibit 56 its analyses of current funding versus expenditures to date. Based on its estimates of operational costs, sufficient funds have been provided for continued operation through an extended period; under SP's ICC tariff charges the total available funds have been exhausted. SP is insistent that its ICC tariff charges are applicable and

SP intends to pursue collection through the courts. Caltrans' assessment is that prudence requires it to assume SP will prevail, so that it will not overspend allocated funds. Regardless of the merits of this position, it is clear that Caltrans no longer desires to assume the responsibility of subsidizing the service until the cost issue is settled.

Funding by Other Agencies

No local agencies appear willing or able to commit funds for continued operation of the Los Angeles-Oxnard commute service at this time. This is understandable in light of the impossibility of determining the precise level of funding needed when that issue is still in dispute, the need of the agency to supply operating equipment for the service, and the need to assume primary responsibility for injuries and damage occurring as a result of the operation. This Commission does not have sufficient factual information at this time to advise the local agencies of the level of required support because the Commission deferred to Caltrans' request that it be permitted to negotiate the level of funding and related issues when the service was ordered.

As indicated earlier in this opinion, issues of public convenience and necessity are not an issue in this phase of the proceeding as those issues have been decided. Those issues having been decided, if we order suspension or termination of service for lack of funding, we can order restoration of the service when it has been shown that funding is available. Should a local or state agency decide to provide funding for the Los Angeles-Oxnard commute service at some future date, application may be made to this Commission for resumption of the service.

Resolution of Charges for Past Services

The issues of charges for services performed to date were reserved for later consideration. The evidence indicates a wide disparity between the SP and Caltrans on these issues. Caltrans' intention is to file a complaint with the ICC. SP's intention is to collect the charges in its ICC tariff through court action, if necessary. The Commission reserves the right to

consider, in supplemental proceedings, the level of public subsidy and related conditions reasonably required to support the past and potential future operation of Caltrains.

Suspension or Termination

SP and Caltrans seek suspension of the service for an unspecified period. The record is clear that is unlikely that equipment adequate for the service or adequate funds to meet the operating costs of the service will be available in the near future. However, should the resolution of the dispute between Caltrans and SP provide a lower level of funding than claimed by SP, funding may be available from local sources, and Caltrans and CTC may wish to reconsider their current positions. We conclude that the service should be temporarily suspended with the proviso that service can be restored upon a showing that adequate funding and equipment are available.

Preservation of Stations

In view of our conclusion to suspend, rather than terminate the service, we will exercise our jurisdiction to order SP to preserve intact the passenger station and parking facilities constructed by Caltrans and turned over to SP. Public agencies are concerned with the preservation of station and parking facilities should funding become available for the train operation. The record indicates that the costs of maintaining the station, platform, and parking facilities will be minimal, and that parking facilities may be a source of revenue to SP.

Findings of Fact

Commission Orders

1. D.91847 found that public convenience and necessity exists for the operation of a rail commuter service between Oxnard and Los Angeles over SP tracks (Caltrain). That decision contains several findings and conclusions concerning the operation of that service.

2. D.93118 modified key findings in D.91847, pertinent here as follows:

"13. Complainant (Caltrans) will reimburse SP for all costs actually and reasonably attributable to the commuter service.

"30. SP will be compensated for all freight and Amtrak delay costs actually and reasonably attributable to the commuter service."

3. D.82-10-041 directed institution of Caltrain service on October 18, 1982. Service began on that date.

4. D.82-10-041 directed Caltrans to provide the equipment required to operate the Caltrain service. Caltrans has provided equipment for the service.

5. D.82-10-41 gave Caltrans the right of immediate entry on SP property to construct station and parking facilities at Moorpark, Camarillo, Burbank, Burbank Airport, and Chatsworth stations. The facilities were constructed by Caltrans. Such properties are now under lease by Caltrans from SP.

Requests for Suspension

6. Caltrans has advised the Commission that as a consequence of the fiscal and equipment uncertainties and the unresolved issue of third-party liability and that in view of the much lower-than-expected patronage for the Caltrain service, suspension would be in the public interest (Ex. 51). By motion dated February 18, 1983, Caltrans has requested that this Commission take immediate action to order suspension of the Caltrains. On February 22, 1983, SP filed its petition requesting authority to immediately suspend service.

Available Subsidy Funds

7. D.91847 and subsequent decisions ordered SP to negotiate with Caltrans concerning a subsidy agreement for Caltrains.

8. SP and Caltrans have not agreed upon the compensation to which SP shall be entitled for operating the service. SP is demanding the sum of \$588,200 per month as set forth in its tariff filed with the ICC. Caltrans disputes this amount and believes that a significantly lesser amount is reasonable compensation.

9. Table I compares the present state funding provided for Caltrains operations with the Caltrans' estimate of net expenditures through February 28, 1983 and with the charges

resulting under SP's tariff. Under Caltrans' estimate of expenditures, there remains a balance of authorized funds of \$2,552,860, sufficient to continue Caltrains operations beyond the end of the current fiscal year.

10. Under SP's tariff charges, there is a deficit of state authorized funds to continue Caltrains operations, as shown in Table 1.

11. Although Caltrans objected to the ICC's receipt of the SP tariff, the ICC did accept SP tariff SP-P-9003, effective December 2, 1982, specifying the compensation which SP is to be paid for operating the Oxnard Caltrains. On January 17, 1983, the ICC refused to reconsider its vote which declined to reject, suspend, or investigate the SP tariff.

12. SP asserts that, with the acceptance by the ICC of its tariff, it is required to pursue, and will pursue, collection of the amounts named in the ICC tariff, unless and until the ICC modifies such amounts, or the ICC tariff is held by a federal court of appeals to be inapplicable.

13. Should the ICC tariff ultimately be upheld, Caltrans' operating funds for Caltrains service were exhausted on January 26, 1983.

14. Inasmuch as funding for Caltrains is exhausted if SP prevails, and as Caltrans cannot lawfully provide funding for Caltrains in excess of that authorized, Caltrans and SP ask that Caltrains operation be suspended.

15. No funding for Caltrains has been proposed in the Governor's fiscal year 1983-84 budget, and the CTC, at a meeting held February 24, 1983, recommended to the legislature that no funding be allocated for Caltrain.

16. Cities, counties, and local transit districts in areas where Caltrains operates were requested to advise this Commission whether funding of Caltrains was available other than through the State.

17. LACTC advised that its only known source of alternative funding is from Los Angeles County's $\frac{1}{2}\%$ sales tax. Several months will be required for LACTC to study the Los

Angeles-Oxnard corridor to determine whether Caltrains or some other rail transit system should be supported by Los Angeles' sales tax revenues.

18. Ventura County and the Cities of Simi Valley and Oxnard are unwilling to commit funds for Caltrains at the level set forth in SP's tariff, and will consider funding only when the dispute between Caltrans and SP over the reasonable level of funding necessary to operate Caltrains is settled.

19. No city, county, or local agency has offered to provide funding for to continue Caltrain operations.

20. Prudent fiscal management mandates that the service be suspended until the fiscal contingency is removed, and the full extent of Caltrans' financial obligations are clarified.

Equipment

21. Caltrans undertook to provide locomotives and passenger cars for the Caltrains. Caltrans initially sought to use Amtrak P30CH locomotives and Amtrak passenger cars for the service and later substituted RTA cars for the Amtrak cars. This Commission ordered SP to execute a lease with Amtrak for the P30CH locomotives in order to permit the service to start (D.82-10-041, Ordering Paragraph 2).

22. After a series of derailments with P30CH Amtrak locomotives at Oxnard and at various locations along SP's Sunset route, SP removed the P30CH locomotives from service for safety reasons pending full investigation. As a result of that investigation, SP has concluded that Amtrak P30CH locomotives cannot be used on the Montalvo Wye or on the Oxnard team track where the Caltrains are stored overnight, unless a substantial track rebuilding program which could cost in excess of \$500,000 is undertaken. Caltrans has asked SP to cancel the Amtrak locomotive lease and return the locomotives to Amtrak (Ex. 62).

23. Caltrans was advised by RTA that it required the RTA cars to be returned, and Caltrans' lease for the cars from RTA was cancelled. Caltrans returned the RTA cars, and they are no longer available for service in Caltrain operations.

24. Caltrans and SP agreed to substitute, on an emergency basis, Peninsula commuter equipment and locomotives to operate Caltrains. This arrangement has proven to be unsatisfactory, as the cars are needed for reserve service in the Peninsula commute operations.

25. Caltrans has been unable to locate and obtain suitable equipment for Caltrain operations.

26. Caltrans asks that SP, rather than Caltrans, be directed to provide equipment, if Caltrain service is resumed.

Third-party Liability

27. SP and Caltrans disagree as to the type of risks which should be borne by Caltrans.

28. As of February 28, 1983, neither SP nor Caltrans has procured insurance for the protection of the public, State of California, and SP with respect to the operation of Caltrain nor has Caltrans agreed to accept full liability costs as its responsibility.

Subsidy payments for Prior Operations

29. SP and Caltrans have not agreed upon the compensation to which SP shall be entitled for operating the service through February 28, 1983. The disputed amounts include concern over freight and Amtrak delay costs (D.93211, Finding 30), a just and reasonable return on the property devoted to the service (D.93211, Finding 32), and a reasonable rental for properties used for the commuter service (D.93211, Finding 33).

30. Caltrans seeks a directive from this Commission to SP to supply cost data for Caltrain operations to date. SP is willing to furnish such data 30 days after suspension of the Caltrain operations.

31. Caltrans seeks an order from this Commission directing SP not to assess the charges in its ICC tariff.

32. Caltrans has announced its intention to file a complaint with the ICC concerning the charges in SP's ICC tariff.

Conclusions of Law

1. The Caltrains service between Oxnard and Los Angeles should be temporarily suspended.

2. SP and Caltrans should be permitted to terminate the locomotive agreement with Amtrak to allow the P30CH locomotives to be returned to Amtrak.

3. An emergency exists which requires that SP and Caltrans be exempted from the notice requirements of General Order 27-B to allow suspension on two days' notice.

4. While Caltrans has announced its intention to file a complaint with the ICC concerning the issues of compensation due SP for past operations and the applicability of SP's ICC tariff, this Commission should retain its jurisdiction over the issue of public subsidy levels and related conditions reasonably required to support the past and future potential operation of Caltrains.

5. SP should be directed not to modify, change, or remove existing Caltrain stations, platforms, and parking facilities at Moorpark, Chatsworth, Panorama City, Burbank Airport, and Simi Valley stations.

6. In view of the emergency that exists, this order should be considered immediately, without public notice of the Commission's public meeting agenda, under provisions of Public Utilities Code § 306(b).

INTERSTATE COMMERCE COMMISSION**EX PARTE NO. 388**

- Agency:** Interstate Commerce Commission
- Action:** Notice of Filing requirement and procedures for State exercise of jurisdiction over intrastate rail rates.
- Summary:** To exercise jurisdiction over intrastate railroad rates, State authorities are required by the Staggers Rail Act of 1980 to submit, for ICC approval, standards and procedures consistent with the new legislation. This notice directs the filing of these proposals and explains the standard of ICC review.
- Date:** Proposals are due January 29, 1981. No extensions are permitted.
- Address:** An original and six copies of the proposal, signed by an authorized State official, should be sent to:

Room 5340
Interstate Commerce Commission
Washington, D.C. 20423

For Further Information Contact:

Richard B. Felder or Martin Zell
(202) 275-7693 (202) 275-7138

Supplementary Information:

The Staggers Rail Act of 1980 amends 49 USC §11501 to require that a State authority may only exercise jurisdiction over intrastate railroad rates exclusively in accordance with the Interstate Commerce Act, as amended. The new law also prohibits the exercise of jurisdiction by State authorities over general rate increases under 49 USC §10706, inflation based rate increases under 49 USC 10712 or fuel adjustment surcharges which we may authorize.

The new law requires that, on or before January 29, 1981, each State authority wishing to exercise jurisdiction over intrastate rail rates, classifications, rules, and practices shall submit to the ICC for approval standards and procedures (including timing requirements) consistent with this legislation. The same process must be repeated every five years. During each five-year period, State standards may not be changed without notifying the ICC and receiving our approval.

We do not anticipate that this certification procedure will be a difficult one. We do not expect State authorities to submit unnecessarily detailed or complicated proposals reiterating the provisions of the statute. We merely wish to receive sufficient information to conclude that the State authority intends to exercise jurisdiction consistent with the law, and to do so in a timely fashion.

This decision does not significantly affect either the quality of the human environment or the conservation of energy resources.

A copy of this notice will be served on the Governors, Public Service Commissions and the Transportation Committees in the legislatures of each State. It will also be available for inspection in the Office of the Secretary, Interstate Commerce Commission.

Dated: November 3, 1980

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Clapp, Trantum, Alexis and Gilliam.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 388

**STATE INTRASTATE RAIL RATE
AUTHORITY—P.L. 96-448**

Agency: INTERSTATE COMMERCE COMMISSION

Action: NOTICE OF DECISION

Summary: The Commission has decided to certify provisionally 40 states to exercise jurisdiction over intrastate railroad rates under Section 214 of the Staggers Rail Act of 1980. The certifications will expire on June 29, 1981, unless the State files standards and procedures which confirm its intent to exercise its jurisdiction in conformance with Federal standards. By August 28, 1981, the Commission will decide whether or not unconditionally to certify each of those States that has filed standards and procedures.

Date: Each State must file its standards and procedures with the Commission on or before Monday, June 29, 1981. Railroads and other interested persons may file comments 20 days later.

Effective

Date: This decision will be effective on April 29, 1981.

For Further Information Contact:

Richard B. Felder or Martin D. Zell
(202) 275-7693 or (202) 275-7138

Supplementary Information:

BACKGROUND

This proceeding was instituted to notify the States of how we intended to implement Section 214 of the Staggers Rail Act of 1980. Section 214 requires the States to apply to us for certification of their standards and procedures for railroad rate regulation in order for them to retain jurisdiction over intrastate railroad transportation.

The notice initiating this proceeding, 45 Fed. Reg. 74571(11-10-80), stated our view that the certification procedure should be a simple one. We required the States to submit sufficient information to permit us to conclude that each intended to exercise its jurisdiction consistent with the law, and to do so in a timely fashion.

THE CERTIFICATION REQUESTS

By the statutory deadline, January 29, 1980, 40 States filed for certification.¹ All expressed their intention to follow the standards and procedures of the Interstate Commerce Act, as amended by the Staggers Rail Act. Little or no information was offered to establish how the States planned to turn their intentions into standards and procedures which conform to Federal law. In fact, a number of requests for certification and comments filed by the railroads, suggested clear conflicts between State and Federal standards.

For example, Minnesota stated that tariff changes involving Minnesota intrastate commerce require approval of its Public Utilities Commission prior to publication. Only those changes which are noncontroversial may be approved without a hearing. Such standards do not meet the requirements of the Staggers Rail Act. 49 U.S.C. §10701a permits a rail carrier to establish any rate unless it is prohibited by law. On this record we are not prepared to certify unconditionally that Minnesota has standards and procedures which will permit it to exercise its jurisdiction in conformance with Federal Law.

¹ The Southeastern Pennsylvania Transportation Authority filed a request to confirm its view that as a local public body providing rail mass transportation services under the exemption of 49 U.S.C. §10504 it need not seek certification. We agree with SEPTA.

Questions raised by a number of railroads about Florida, Colorado, Wisconsin, Mississippi and Louisiana are equally serious. These States, with the exception of Wisconsin, have by regulation established elaborate justification and notification requirements which must be followed before a rate is changed. Florida adopted new regulation concerning general rate increases despite the fact that these matters are no longer subject to its jurisdiction. 49 U.S.C. 11501(b)(6). Nevertheless, each of these States has filed for certification and expressed its intent to abide by Federal standards and procedures. We also note that Colorado and Wisconsin have taken steps to conform certain of their rate filing requirements to the Staggers Rail Act of 1980. Our stated reservations about Minnesota apply to these States as well.

Questions have also been raised concerning the ability of Wisconsin to conform its standards and procedures to Federal law under its existing statute. The Chicago and Northwestern Transportation Company is concerned that Wisconsin's broadly phrased regulatory statute cannot accommodate the narrower standards of the Federal statute. We do not agree. We believe that a State with a broadly phrased statute is in an excellent position to apply the narrower standards of the Federal statute. As long as the existing State law is broad enough to use the Federal standards without creating a conflict, and the State demonstrates its plan to do so, we are prepared to certify the State.

Finally, a petition was filed by Conrail on April 7, 1981 objecting to our certification procedures and bringing to our attention recent actions by Ohio and West Virginia which it believes are wholly inconsistent with Federal standards and procedures.

Conrail has described and documented actions taken by these States on March 31, 1981 which do not conform to Federal standards and procedures. Ohio and West Virginia suspended certain rates without determining whether Conrail has market dominance over the transportation service. The jurisdictional threshold for evaluating the reasonableness of rates was not mentioned. Other deficiencies are evident when the actions of these States are compared to Federal standards.

Conrail would have us deny certification to these States and assert jurisdiction under 49 U.S.C. §11501(b)(4)(B) and approve the rates filed by Conrail. Neither of these actions appears to be necessary at this time. Section 11501(b)(3)(B) approves a transition period during which the State procedure in effect at the time the new law was enacted are deemed certified until we decide whether or not to certify the State, see No. 37595, *Burlington Northern, et. al.—Petition for Review* (not printed), decided January 28, 1981. Nevertheless, the actions taken by these States on the eve of our certification decision casts serious doubt on their January, 1981 certification requests.

CONDITIONAL CERTIFICATION

Under Section 214 we have an affirmative obligation to certify a State authority once we determine that the standards and procedures submitted by the States are in accordance with Federal law. We have tried to keep the process as simple as possible. However, based on the present record, we cannot make the findings required by the law.

We find ourselves in partial agreement with the position taken by the Association of American Railroads in its comments of March 16, 1981. We do not seriously question whether the expressions of intent by the States are genuine. However, the statute requires something more. We need "sufficient information" to base the findings which we must make under the law. Extensions may also be granted if other extraordinary circumstances related to needed legislative changes can be demonstrated.

Under these circumstances, we have decided to certify conditionally each State which has expressed its intention to exercise jurisdiction consistent with the law, and to do so in a timely fashion. Each provisional certification will expire on June 29, 1981, unless prior to that date the State files standards and procedures which confirm its intention to exercise its jurisdiction in conformance with Federal standards. Failure to file standards and procedures by June 29, 1981 will be taken as an expression of intent not to exercise jurisdiction consistent with the law, and will result in the immediate loss of provisional certification.

The one exception to this requirement is for a State which needs a legislative change to bring its standards and procedures into compliance with Federal law. An extension of the provisional exception will be considered if the State's legislature has not had a scheduled session since October 15, 1980.

We also have decided to certify conditionally the States which we earlier identified as having defects in their standards and procedures. These defects are mainly in agency rules which can be changed easily. We believe it is better to proceed this way than to deny certification in the face of a State's declaration of intent to comply.

We have tried to assist the States in meeting their responsibilities under section 214. We recognize that there are transitional difficulties that are perhaps inherent in the changes required by the Staggers Act. Our Federal/State workshop on the Staggers Rail Act of 1980 was designed to answer some of the unanswered questions about the new law. Our staff is working with the National Association of Regulatory Utility Commissioners to distribute a handbook for the States on the new law. Through formal and informal contacts with the States we have attempted to explain and clarify the certification process.

We are prepared to certify those States which have enacted the Staggers Rail Act of 1980 as the law of their State. As we discussed earlier, certification is possible for States like Wisconsin which have broadly phrased statutes which can accommodate the narrower standards of the new law. State statutes which require rates to be just and reasonable can be read in conjunction with the market dominance requirement and jurisdictional threshold ratios of the Staggers Rail Act of 1980. A prohibition against unjustly discriminatory rates is clearly broad enough to accommodate the narrower standards of 49 U.S.C. §10741. Regardless of the method selected to comply with the standards of the Staggers Rail Act of 1980, all States must amend their procedures and timing requirements to conform with Federal law.

We will continue to make every effort to assist the States in meeting their responsibilities under the new law. We remain

confident that those States which desire to be certified will perfect that status.

Each State listed below is certified conditionally as having standards and procedures (including timing requirements) which permit it to exercise jurisdiction over intrastate railroad transportation in accordance with Federal law. Each certification will become final and unconditional only if after examining the State's standards and procedures filed as required above, we decide that the proposal conforms to Federal law.

Alabama	Maine	North Carolina
Arkansas	Maryland	North Dakota
Colorado	Michigan	Ohio
Florida	Minnesota	Oklahoma
Georgia	Mississippi	Oregon
Idaho	Missouri	Pennsylvania
Illinois	Montana	Rhode Island
Indiana	Nebraska	South Carolina
Iowa	New Hampshire	Tennessee
Kansas	New Jersey	Texas
Kentucky	New Mexico	Utah
Louisiana	New York	Virginia
		Washington
		West Virginia
		Wisconsin
		Wyoming

The 10 States and the District of Columbia that did not seek certification have lost all jurisdiction to regulate intrastate rail transportation.²

This decision does not significantly affect either the quality of the human environment or the conservation of energy resources, nor does it have any significant effect on small entities.

CONCLUSIONS

Each of the States listed in this decision is provisionally certified as having standards and procedures (including timing requirements) that permit it to exercise jurisdiction over intrastate railroad transportation in accordance with Federal law.

² The States are Alaska, Arizona, California, Connecticut, Delaware, Hawaii, Massachusetts, Nevada, South Dakota, and Vermont.

Each provisional certification will expire on June 29, 1981, unless prior to that date the State files standards and procedures which confirm its intention to exercise its jurisdiction in conformance with Federal standards.

Each State seeking unconditional certification must file its standards and procedures with the Commission on or before June 29, 1981. Railroads and other interested persons may file comments up to 20 days later.

The Commission will decide by August 28, 1981, whether or not to certify unconditionally each of those States that has filed standards and procedures as required by this decision.

A copy of this decision will be served on the Governor Public Service Commissions and the Transportation Committees in the legislatures of each State. It will also be available for inspection in the Office of the Secretary, Interstate Commerce Commission.

Authority: 49 U.S.C. 10321 and 11501.

Date: April 17, 1981

By the Commission, Acting Chairman Alexis, Commissioners Gresham, Clapp, Trantum, and Gilliam. Commissioner Gresham concurred with a separate expression. Commissioner Trantum was absent and did not participate.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

COMMISSIONER GRESHAM, concurring:

Language within this decision would appear to provide an opportunity for the Commission to further extend the deadline for compliance with the Staggers Rail Act of 1980 beyond the 60-day limit set out above.

However, parties should be aware that only in the most compelling circumstances can the Commission respond to extension requests. It is clear that section 214 of the Staggers Act contained rigid statutory deadlines in order to accomplish State conformity within a very short, specific time. Indeed, as originally written, the House bill would have preempted completely State jurisdiction over intrastate rail rates. With that legislative background, the strict language of the statute seems to leave little room for administrative latitude. The Commission, through this decision, is at the furthest extent of that latitude.

INTERSTATE COMMERCE COMMISSION REPORTS**EX PARTE NO. 388****STATE INTRASTATE RAIL RATE AUTHORITY—
P.L. 96-448**

Decided May 4, 1982

AGENCY: Interstate Commerce Commission.

ACTION: Assumption of Commission Jurisdiction over Intrastate Rail Transportation.

SUMMARY: By notice published in the Federal Register on February 8, 1982 (47 F.R. 5786), the Commission indicated that 14 States and the District of Columbia had not sought certification pursuant to 49 U.S.C. 11501(b) and that, as a consequence, they had lost all jurisdiction to regulate intrastate rail rates. We stated that these States should inform the Commission by March 10, 1982, if they wanted us to assume intrastate regulation. In the absence of such indication, we stated we would not assert jurisdiction.

Six States have asked us to assume jurisdiction: California, Connecticut, Delaware, Mississippi¹, Nevada, and North Carolina. Consequently, the Commission shall assume jurisdiction over intrastate rail transportation in those States upon publication of this notice in the Federal Register. Rail carriers in these States shall comply with Commission regulations such as the filing of intrastate tariffs with us.

South Dakota specifically requested that we not assert jurisdiction over intrastate rail transportation. No response was received from the remaining States: Alaska, Arizona, the District of Columbia, Hawaii, Maine, Massachusetts, Rhode Island, and Vermont. Thus, we shall not assume intrastate rail rate regulation in these States.

EFFECTIVE DATE: May 11, 1982.

¹ Mississippi did not file until March 16, 1982, but their request shall be accepted.

FOR FURTHER INFORMATION CONTACT:

Jane F. Mackall
(202) 275-7656

This decision does not significantly affect the quality of the human environment or conservation of energy resources.

Authority: 49 U.S.C. 11501.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Gresham, Sterrett, and Andre.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

**INTERSTATE COMMERCE COMMISSION
DECISION
SPECIAL TARIFF AUTHORITY NO. 83-1376
APPLICATION Dated November 4, 1982
PASSENGER TARIFF
DECIDED: November 10, 1982**

Southern Pacific Transportation Company has filed an application requesting special tariff authority to file tariff or schedule matter upon less than statutory notice in the manner and form set forth in the application. The application should be referred to for all details.

Sufficient justification has been presented to warrant granting the application in whole or in part.

This action will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

Authority to depart from the terms of 49 CFR 1303 to the extent necessary to publish, upon lawful notice. Void for filing after December 8, 1982. Special Tariff Authority granted herein shall not be construed as providing any affirmative or negative decision in connection with proceedings under litigation between the Southern Pacific Transportation Company and the State of California, a matter for the Courts to decide. Further a copy of the publication is to be transmitted to the California Dept. of Transportation at the same time it is transmitted to the Commission. The special tariff authority application insofar as it sought short notice is denied.

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Except as otherwise authorized, this decision does not modify any outstanding formal orders of the Commission nor waive any of its regulations.

By the Commission, Special Permission Board,
Members Manning, Mongelli and Herzig.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

TO: Southern Pacific Transportation Company
c/o Stepto & Johnson
Mrs. Betty Jo Christian
1250 Connecticut Avenue
Washington, DC 20036

INTERSTATE COMMERCE COMMISSION
Office of the Secretary
Washington, DC 20423

Suspension Case No. 70965
December 1, 1982

NOTICE:

**CALIFORNIA SPECIAL TRAIN SERVICE,
SOUTHERN PACIFIC**

Southern Pacific Transportation Company (SP), San Francisco, CA, is proposing to establish a new rail passenger tariff for operation of a commuter passenger demonstration service between Oxnard, CA, and Los Angeles, CA; the proposed charge for such service is \$588,200 per month.

The proposal, which bears an effective date of December 2, 1982, is published in "California Special Train Service Tariff" ICC-SP-P-9003.

A protest was received from the State of California—Business and Transportation Agency, Department of Transportation. SP replied to the protest.

On November 29, 1982, the Suspension Board (Members Fitzgerald, Halvarson and Hall) considered the matters at issue in the protest and the reply to the protest and voted not to suspend and not to investigate. The protestant filed an appeal from the Board's action.

On December 1, 1982, Division 1, Commissioner Simmons, Taylor and Gradison, acting as an Appellate Division, considered the matters at issue and did not reach a majority vote. The new rail passenger tariff will become effective as scheduled. The votes of the Division appear below:

Commissioner Simmons: "I vote to reject the tariff. What is involved is an operation which will be subsidized by the State of California based upon a contractual agreement. Acceptance of the tariff would have this Commission setting forth the subsidy arrangement. Moreover, I have some doubts as to

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whether the Commission has jurisdiction to determine rates of intrastate passenger service which is wholly subsidized by the State of California";

Commissioner Taylor voted to "deny the appeal" (not to suspend and not to investigate); and,

Commissioner Gradison"... would grant the appeal and suspend and investigate the proposed tariff."

AGATHA L. MERGENOVICH
Secretary

**INTERSTATE COMMERCE COMMISSION
DECISION**

SUSPENSION CASE NO. 70965

**CALIFORNIA SPECIAL TRAIN SERVICE,
SOUTHERN PACIFIC**

Decided January 17, 1983

This decision refers to an action by Division 1 (Commissioners Simmons, Taylor and Gradison) acting as an Appellate Division in connection with the decision by the Commission's Suspension Board (Members Fitzgerald, Halvarson and Hall) not to suspend and not to investigate tariff schedules filed by the Southern Pacific Transportation Company (Southern Pacific). Southern Pacific had filed its Special Passenger Train Service Tariff ICC-SP-P-9003 with this Commission on November 12, 1982, to become effective on December 2, 1982. This tariff contains the charges, rules, and regulations for service between Oxnard, CA, and Los Angeles, CA (and intermediate points).

Southern Pacific's Tariff ICC-SP-P-9003 replaced an earlier issue (ICC-SP-P-9002) which had been rejected because of failure to comply with this Commission's tariff filing requirements. Southern Pacific sought and obtained special tariff authority relief from these requirements prior to submitting its new tariff.

The California Department of Transportation* (CalTrans) requested rejection of Southern Pacific's Tariff ICC-SP-P-9003 and then, after the request for rejection had been denied by Mr. W. P. Geisenkotter, Chief of this Commission's Section of Tariffs, requested that the tariff be suspended and investigated. The Southern Pacific filed a reply to the request for suspension and investigation.

After consideration of the issues raised by CalTrans and by Southern Pacific in Suspension Case No. 70965, the Suspension Board voted on November 29, 1982, not to suspend and not to investigate the proposed tariff schedules. CalTrans filed an appeal from the Board's decision and the matter was placed before Division 1 as an appellate division to resolve the question of possible suspension and investigation.

On December 1, 1982, it was announced that the Division had failed to reach a majority concerning the disposition of the petition (appeal) and that the petition (appeal) was therefore denied. Commissioner Simmons had voted to reject the tariff; Commissioner Gradison had voted to grant the appeal and to suspend and to investigate the proposed tariff; and Commissioner Taylor had voted to deny the appeal.

(Suspension Case No. 70965-1)

SUSPENSION CASE NO. 70965

By a petition filed with this Commission on December 27, 1982, CalTrans has sought to have this matter reopened. As reason for its petition, CalTrans alleges that a majority was reached to the effect that the tariff should be suspended. It is CalTrans' position that the question before the Division was whether to grant the appeal (suspend the tariff) or to deny the appeal (not to suspend the tariff). CalTrans reasons that the vote to reject the tariff can only be interpreted as a vote to grant the appeal and therefore to suspend.

CalTrans requests that the notice issued in this matter be corrected to reflect the action taken by the Division and that an appropriate order be issued.

Southern Pacific filed a reply to CalTrans' petition on January 4, 1983.

We have reviewed the statements made in this proceeding by CalTrans and by Southern Pacific. We have also reviewed the votes of the individual Commissioners assigned to this Division in connection with the disposition of the request for reconsideration of the action by the Suspension Board in this matter. We note that the fact that this matter was brought before us by the filing of an appeal from the Suspension Board's decision not to suspend did not constitute a bar to consideration of possible rejection of the tariff by the Division on the Division's own initiative. We also note that one Commissioner did vote to take such action. However, we cannot agree with petitioner's contention that a vote to reject a proposed tariff can be considered to be a vote to suspend and investigate that tariff.

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On the basis of our review of the record in this matter, we find that the notice dated December 1, 1982, correctly stated the action taken by this Division in this matter. In the absence of a majority vote to grant the appeal (i.e. to suspend and investigate), the protested schedules were not suspended and they were not investigated.

It is ordered:

The petition filed by The State of California, Department of Transportation, on December 27, 1982, is denied.

By the Commission, Division 1 acting as an Appellate Division, Commissioners Simmons, Taylor, and Gradison.

JAMES H. BAYNE
Acting Secretary

(SEAL)

(Suspension Case No. 70965-1)

INTERSTATE COMMERCE COMMISSION

* * *

DECISION

* *

Finance Docket No. 30123**SOUTHERN PACIFIC TRANSPORTATION COMPANY
DISCONTINUANCE OF PASSENGER TRAIN SERVICE
IN VENTURA AND LOS ANGELES COUNTIES, CA**

* *

*

Decided: November 28, 1983

Southern Pacific Transportation Company (SoPac), a common carrier by railroad operating in interstate commerce subject to the jurisdiction of this Commission, and in intrastate commerce in California and other States, by a petition filed February 9, 1983, seeks an order of the Commission granting to SoPac the authority to discontinue passenger train service between Oxnard, in Ventura County, and Los Angeles, in Los Angeles County, all in California,¹ serving various intermediate points. As later discussed, the passenger train service in issue was operated by SoPac as a demonstration commuter service pursuant to the orders of the California Public Utilities Commission (CPUC) from October 18, 1982, until March 13, 1983, when operation of the service was suspended. The Commission is requested to find, pursuant to section 10909 of the Interstate Commerce Act (the act), that continued operation of the passenger train service will impose an unreasonable burden on the interstate operations of SoPac and on interstate commerce, and that the public convenience and necessity require or permit the permanent discontinuance of the service.

The proposed discontinuance was protested by CPUC and others, and by an order served March 4, 1983, the Commission instituted an investigation and assigned the matter for public

¹ Unless otherwise indicated, all points named in this decision are in California.

hearing before this Administrative Law Judge. Hearings have been held, at Los Angeles on April 6 and April 7, 1983, and at San Francisco on June 6 through June 9, 1983. The discontinuance was opposed by the California Department of Transportation (Caltrans), by certain railway labor unions,² by the Simi Valley City Council, and by various individuals who appeared to testify in opposition. On its own behalf and on behalf of the people of the State of California, CPUC appeared through counsel for the sole purpose of raising objections relating to the Commission's jurisdiction in this matter, as later discussed. Briefs were filed by SoPac and Caltrans.

CPUC and Caltrans sought dismissal of SoPac's petition herein by motions filed March 21, 1983, on the grounds that (a) the Commission lacks jurisdiction over this intrastate service, and (b) the matter is moot in view of the suspension of the train service. By an order served April 5, 1983, the Judge denied these motions. By another order served May 18, 1983, the Judge authorized CPUC and Caltrans, at their request, to file an interlocutory appeal from the April 5 order. Their joint appeal filed May 5, 1983, to which SoPac has replied, is still pending before the Commission.

The subject passenger train service, known to the public as the Caltrains, was operated daily, Monday through Friday (except on holidays), departing Oxnard in the morning (Nos. 102 and 104) and returning from Los Angeles in the late afternoon (Nos. 101 and 103), with stops at the intermediate points of Glendale, Moorpark, Simi Valley, Chatsworth, Panorama, and Burbank Airport. Departure times were geared to the business day in order to provide a service for commuters in and out of Los Angeles. The passengers were charged fares either for individual rides or on the basis of weekly or monthly commutation tickets. Operation of the trains was by SoPac, but this carrier otherwise had no part in, and no control of or responsibility for, the rail commuter service. Caltrans (and, by agreement between Caltrans and Amtrak, Amtrak) sold the tickets, and Caltrans built and operated the stations, arranged

² United Transportation Union (UTU) and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC).

the train schedules, and provided for the rolling equipment. At Oxnard, and at the intermediate point of Glendale, the trains used Amtrak station facilities, and at Los Angeles the trains stopped at the Union Passenger Terminal. The other stops were at locations selected by Caltrans, at stations designed and constructed by Caltrans, located for the most part on SoPac property. After November 28, 1982, each Caltrain operated consisted of one or two double deck commuter cars, owned by SoPac and operated under lease to Caltrans, and a SoPac locomotive leased to Caltrans. Before then, Amtrak locomotives and other leased cars were used. The route of movement of the Caltrains was over SoPac's coastal main line running between Los Angeles and San Francisco. Each train, each way, operated 66 miles between Los Angeles and Oxnard; 55 miles, single track, between Oxnard and Burbank Junction, over the coastal line, and 11 miles, double track, between Burbank Junction and Los Angeles, over SoPac's valley line.

Prior to the inception of the Caltrain service there had never been a commuter passenger train service on SoPac's coastal main line to and from Los Angeles. It is quite clear on this record that the commencement of this service was not voluntary on the part of SoPac. To the contrary, there is no question but that SoPac's participation was entirely involuntary, that SoPac was dragged, kicking and screaming, into the operation of the Caltrains. The events that led to the establishment in October 1982 of the Oxnard-Los Angeles commuter service commenced in May 1978, when the County of Los Angeles (the County), joined by Caltrans, filed a complaint with CPUC in which CPUC was requested to order SoPac to operate a passenger train service between Oxnard and Los Angeles. Caltrans was engaged in developing a balanced transportation system within the State, and sought by this move to promote rail commuter service as a counterbalance to rapidly-increasing automobile traffic, then said to constitute about 86 percent of all travel within the State, with resulting highway congestion and soaring energy consumption. The County at that time had acquired a number of rail passenger cars which were not then in use, and had requested SoPac to initiate a passenger train service between Oxnard and Los Angeles, using the County's cars, but SoPac had declined. The

County then joined with Caltrans in filing the complaint with CPUC. CPUC held hearings, and in June 1980 issued its decision³ ordering SoPac to provide the Oxnard-Los Angeles rail service according to specified terms on a subsidized basis, a basis which, according to CPUC, would yield to SoPac its avoidable and fixed costs attributable to the service, plus a reasonable rate of return. Unsuccessfully, SoPac opposed the issuance of CPUC's order on grounds much the same as those now advanced before the Commission in the instant proceeding. The CPUC proceedings were later reopened for additional evidence and further hearings. In February 1981 the Board of Supervisors of the county adopted a motion to withdraw the County's participation in the CPUC proceeding, stating among other things that this rail service "is not cost effective," "would increase pollution," and "is not in the best interests of the citizens of the County." The County's withdrawal was noted by CPUC in its decision issued in April 1981.⁴ SoPac had moved to dismiss the County/Caltrans complaint on the ground, primarily, that the County's withdrawal indicated lack of public support for the Oxnard-Los Angeles service, but CPUC in its decision declined to dismiss the complaint and instead ordered SoPac and Caltrans to take certain specific measures preliminary to commencing the train service. Following limited rehearing, another order was concurrently issued by CPUC, in which various changes and modifications were made by CPUC in its prior findings and orders relating to operation of the train service.⁵ In June 1981 CPUC issued another order⁶ in which additional changes and modifications were made in its prior orders, and in which SoPac's motions for reconsideration were denied.

For SoPac, matters took a turn for the worse, if possible, in the early Fall of 1982 as a result of a new proceeding initiated before CPUC by Caltrans, a proceeding in which Caltrans sought to have SoPac's officers and directors cited for contempt for failure to comply with conditions and requirements imposed on SoPac by CPUC in its June 1980 and later orders. Primar-

² United Transportation Union (UTU) and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC).

³ CPUC decision No. 91847, received in evidence as Exhibit H-21 in the instant proceeding.

⁴ CPUC decision No. 92862, received here as Exhibit H-22.

⁵ CPUC decision No. 92863, in evidence here as Exhibit H-23.

⁶ CPUC decision No. 93211, in evidence here as Exhibit H-24.

arily. SoPac had failed to construct station platforms and other facilities at specified points on the line as directed by CPUC, thus impeding the commencement of service. Caltrans was pressing for commencement of service on October 15, 1982, and requested CPUC to direct SoPac to permit Caltrans to enter upon SoPac's property in order for Caltrans to construct station platforms, parking, and other facilities in time to commence operations on the target date. After public hearings in this matter in September 1982, CPUC issued its interim opinion⁷ dated October 6, 1982, in which Caltrans was granted its right of entry, and SoPac was ordered to take various additional steps in compliance with CPUC's outstanding orders. SoPac was ordered, among other things, to file with CPUC its timetables and tariffs for the Oxnard-Los Angeles service to become effective on October 18, 1982. However, CPUC deferred consideration of the requested contempt citation, and ordered further hearing on that matter.

On October 18, 1982, a Monday, CPUC issued an emergency interim opinion.⁸ On the previous day a telephonic conference had been held by CPUC with Caltrans and SoPac to deal with last-minute problems that had arisen to block commencement of the train service. In its opinion, CPUC accepted an amended timetable submitted by SoPac, and ordered SoPac to assist Caltrans in obtaining locomotives to operate the Caltrains. Caltrans, at its request, was granted right of entry upon SoPac's property for the purpose of constructing the remaining station sites authorized by CPUC. On that date, as noted, operation of the Caltrains commenced.

Vigorously, albeit unsuccessfully, SoPac has throughout the course of the CPUC proceedings contested the jurisdiction of CPUC and the State of California in this matter, taking the position before the CPUC and in the courts, State and Federal, that jurisdiction herein resides in this Commission. In the state courts, in October 1980 and July 1981, SoPac filed petitions seeking review of the several decisions, previously mentioned, in which SoPac was ordered by CPUC to operate the Caltrains and to do various things in furtherance of such operations. The

⁷ CPUC decision No. 82-10-032, received in evidence in the instant proceeding as Exhibit H-25.

⁸ CPUC decision No. 82-10,041, in evidence here as Exhibit H-26.

State Supreme Court of California, on December 23, 1981, without hearing or opinion, rejected these petitions for review. SoPac did not seek review of the California decision in the United States Supreme Court. In the Federal court SoPac sought injunctive relief against the enforcement by CPUC of its order requiring SoPac to commence construction of station platforms and other station facilities, on the ground, among others, that the jurisdiction of CPUC and the State of California was preempted by section 214(a) of the Staggers Act (Staggers), P.L. 96-448, enacted October 14, 1980. The United States District Court in California from which SoPac sought its relief did not reach the merits of SoPac's case, but found instead that SoPac's failure to carry to the United States Supreme Court the denial by the California Supreme Court of SoPac's petition for review constituted *res judicata*, preventing consideration by the court of SoPac's argument that CPUC's orders were illegal because state law was preempted by federal law thus precluding CPUC from regulating intrastate train service. Summary judgment was entered against SoPac.⁹ On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the District Court decision.¹⁰ SoPac has advised this Commission that an appeal from the Ninth Circuit will be taken to the Supreme Court.

SoPac alleges that the State of California and its CPUC have not the power to require SoPac to commence or to operate a rail passenger service between Oxnard and Los Angeles or between any other points in California, that by operation of law California has lost its jurisdiction over the rail transportation of passengers within that State and has been divested of any power, in the language of section 10501(c) of the act, "to require reasonable intrastate transportation by carriers providing transportation subject to the jurisdiction of the Commission." That power and that jurisdiction, SoPac contends, is vested exclusively in this Commission. SoPac points out that the act, as revised under Staggers, now provides in section

⁹ Decision in proceeding No. C-82-3074 MHP, dated August 9, 1982, by the United States District Court, Northern District of California (the District Court decision).

¹⁰ Decision in No. 82-4466, dated September 27, 1983 (the Ninth Circuit decision).

11501 that a State authority may exercise jurisdiction over intrastate rail transportation only in accordance with Federal standards, and must, by a procedure provided, first obtain certification by this Commission that the state standards conform with the Federal before the State may exercise jurisdiction. This certification procedure, SoPac notes, was provided in a rulemaking proceeding, Ex Parte No. 388, initiated by the Commission in November 1980, and that by decision in that proceeding served April 22, 1981 (not printed) the Commission conditionally certified some 40 States as having standards and procedures conforming with Federal law. SoPac stresses that California was not one of those States, that the Commission stated in its decision that California, among others, did not seek certification and has "lost all jurisdiction to regulate intrastate rail transportation." A public notice under Ex Parte No. 388, published in the Federal Register of May 11, 1982, advised that California, among other States, had lost jurisdiction over intrastate rail transportation, that California, in fact, had requested the Commission to assume jurisdiction over intrastate rail transportation, and that the Commission, with this public notice, was assuming that jurisdiction.

Neither Caltrans on brief, nor CPUC in stating its position objecting to the assumption by the Commission of jurisdiction in this matter, made specific reference to the Commission's actions under Ex Parte No. 388. Caltrans and CPUC raise the issue of jurisdiction, to be sure, but from a different standpoint. These protestants assert that the act provides, in section 10909(a), that a railroad proposing to change or discontinue a train service entirely within one state may petition the Commission for permission to change or discontinue the transportation only if:

(1) the law of the State prohibits the change or discontinuance;

(2) the carrier has requested the State authority having jurisdiction over the discontinuance or change for permission to discontinue or change the transportation and the request has been denied; or

(3) the State authority has not acted finally by the 120th day after the carrier made the request;

These protestants contend that the instant petition fails to comply with the requirements of section 10909(a) and that, accordingly, SoPac has failed properly to invoke the Commission's jurisdiction in this matter. In this regard protestants allege (a) that "there is no such law of the State of California which prohibits the discontinuance or change of this service", (b) that SoPac has not been denied the relief it sought before the CPUC, and (c) that CPUC has not failed to act finally within 120 days after the carrier requested relief.

The statutory basis asserted by SoPac for the proposed discontinuance is section 10909(a)(2) of the act, that is, that the carrier has requested the State authority (CPUC) for permission to discontinue the trains and that CPUC has denied that request. SoPac states that its request for permission was filed with CPUC on October 26, 1982, and was denied by CPUC order dated December 15, 1982. According to protestants, however, this never happened. The dispute centers on the nature of the document filed by SoPac and the nature of the action taken by CPUC. The document filed by SoPac was captioned "Application for Rehearing of Decision 82-10-010, Interim Order in Decision 82-10-031, and Emergency Interim Opinion in Decision 81-10-041." In it, SoPac contends, the carrier asked for rehearing of the matters underlying the CPUC decisions and orders with "collectively gave rise to an order to start up" the passenger train service, and for vacation of the CPUC orders and restoration of the railroad's plant and facilities to SoPac. The CPUC denial was in a brief order captioned "Order Denying Rehearing." SoPac contends that it is the substance and not the form that governs, and regards this filing and CPUC's summary denial of relief as constituting conformance with the request and denial contemplated in section 10909(a)(2). Caltrans differs, insisting that SoPac's primary act was to request a rehearing, and contending that under California law no action taken by CPUC in response to SoPac's request could have resulted in immediate discontinuance of the Caltrains. Further, Caltrans alleges that the instant petition for authority to permanently discontinue the trains is not the same proposal that SoPac brought before CPUC on October 26, so that it necessarily follows that the Commission lacks jurisdiction under section 10909(a)(2).

These conflicting positions were considered earlier by the Judge in connection with protestants' motions to dismiss, previously mentioned, and are incorporated as well in protestants' interlocutory appeal now pending before the Commission. These protestants also allege that this proceeding is moot, in that SoPac has already been granted authority by CPUC to suspend indefinitely, and has actually suspended, the operation of these trains. Caltrans contends that, in these circumstances, consideration by the Commission of SoPac's petition could be no more than an academic exercise. SoPac argues, however, that this suspension of operations is only temporary, at the pleasure of CPUC, and that the carrier is subject at any time to the further order of CPUC to resume the operations. The carrier adds that it is also bound by the continuing order of CPUC to maintain on its property, and at considerable expense, the several Caltrans-built facilities. In the order served April 5, 1983, the Judge fully considered these matters and denied the motions to dismiss. Nothing in the now-completed record is convincing that this proceeding is moot or that the prior order is otherwise in error. The Judge here specifically reaffirms the prior finding that SoPac has effectively invoked the Commission's jurisdiction under section 10909(a)(2). As hereinafter discussed, however, it is on the basis of section 11501 of the act that the Judge finds that the Commission has jurisdiction in this matter.

The argument advanced by Caltrans, and by CPUC to the extent that it participated in this proceeding, is basically that "unfinished business remains in California," that in furtherance of the national transportation policy the Commission should exercise forbearance and should, consistent with the doctrine of comity, permit this long-standing dispute to run its full course of administrative proceedings and litigation in California. Caltrans notes that it is the national transportation policy, expressed in section 10101(a)(5), to cooperate with each state and the officials of each State on transportation matters. Caltrans cites *Addington v. Texas*, 441 U.S. 430 (1979), to the effect that it is the essence of federalism that states must be free to develop a variety of solutions to local problems without hinderance. In this instance, Caltrans asserts, CPUC is in the

active process of determining the level of public subsidy needed to support the Caltrains, and has made the commitment not to order the resumption of train service unless and until the amount of subsidy is determined and a public entity, ready, willing and able to pay that subsidy, has come forward. Caltrans alleges that the public interest demands that the State of California, through CPUC, in a matter of importance primarily to the people of that State, be permitted to complete its efforts to resolve that matter. SoPac's position, on the other hand, is that the Staggers Rail Act of 1980 established "a whole new set of regulatory ground rules for a railroad industry struggling for survival," that the industry was to be "freed of the shackles and constraints which individual states had applied in pursuit of local benefits." According to SoPac, Staggers terminated state regulation of intrastate rail transportation, including in this context rail passenger service, unless and until the states agreed to regulate, and placed in effect appropriate standards and procedures to regulate, in accordance with, as stated in section 11501(b)(3)(A), "standards and procedures applicable to regulation of rail carriers by the Commission." States failing to comply or to comply adequately with the statute are not certified by the Commission, and thereby lose their power under section 11501(c) "to require reasonable intrastate transportation by carriers", and SoPac contends that California is among those States which are not so certified and has lost its power to regulate intrastate rail transportation. SoPac stresses that the Commission has, in fact, publicly and specifically assumed jurisdiction over intrastate rail transportation in California pursuant to notice under Ex Parte No. 388 published in the Federal Register.

The respective positions of the parties on the jurisdictional issue are further amplified in correspondence initiated subsequent to the filing of briefs. This came about because the Ninth Circuit decision, as noted, came down some two months after briefs were filed, and counsel for Caltrans sent a copy of that decision to the Judge. Counsel for SoPac was quick to write, on October 4, 1983, that there is no inconsistency between the Ninth Circuit decision and the railroad's position herein on jurisdiction, and to contend that the Commission "is not bound in any respect" by the outcome of the court and

CPUC proceedings. Caltrans responded within the week, stating that it is now clear that SoPac's court challenges will not halt the ongoing proceedings at the state level, and contending that concepts of comity and the national transportation policy require that such proceedings be permitted to continue to resolution before the Commission gives consideration to issuance of a discontinuance order. SoPac then wrote again to insist that the Ninth Circuit decision "changes nothing," that it "certainly does not defeat this Commission's jurisdiction" in this matter. On October 18, 1983, Caltrans wrote to clarify its disagreement with SoPac. Caltrans views the disagreement as pertaining to the parties' respective interpretations of section 214 of Stagg's, and to the effect, on California rail passenger operations in particular, of the Commission's decisions and orders in Ex Parte No. 388. Caltrans recognizes that "section 10909 does indeed give the ICC authority to order discontinuance of an intrastate passenger rail operation," but stresses that this is only where a proper petition for relief has been denied or not acted upon by the state authority, and only where there exists an actual rail operation that is capable of being discontinued. It is the heart of protestants' position here, as seen, that those conditions are not present and that the Commission consequently lacks authority to issue a discontinuance order. Caltrans states that its sharpest disagreement with SoPac is with regard to the carrier's contention that the provisions of section 214 of Stagg's apply as well to rail passenger service, and that, pursuant to Ex Parte No. 388, the Commission has lawfully assumed jurisdiction over intrastate rail passenger service in California, to the exclusion of CPUC. The position taken by Caltrans is that SoPac's is a strained interpretation, and that even assuming, *arguendo*, that Stagg's applies to all intrastate rail operations, including passenger service, the Commission does not have jurisdiction over intrastate rail operations in the absence of a request by the affected State that the Commission exercise such jurisdiction. In Ex Parte No. 388, Caltrans alleges, California requested only that the Commission assume jurisdiction over intrastate *freight* operations.

In this correspondence exchange, and before that on brief, SoPac emphasized that the Commission has accepted SoPac's tariff filed to cover the operations of the Caltrains, and the carrier alleges that thereby, and by its order instituting the investigation in the instant proceeding, the Commission assumed jurisdiction over these trains. Caltrans regards this as mischaracterization of the Commission's actions, and contends that the Commission did not accept the tariff but merely declined first to reject it and later to suspend or investigate it. To remove what Caltrans considers to be unwarranted confusion resulting from the filing of SoPac's tariff, Caltrans has now filed a complaint seeking to have the Commission declare that tariff to be unlawful.¹¹ That tariff and the terminology therein employed is of some significance in this proceeding, and is reproduced in the appendix hereto.

Section 214 of Staggers made significant changes and additions with regard to regulation of intrastate rail transportation, including, as noted, the requirement that State authorities may exercise jurisdiction over such transportation only in accordance with Federal standards and procedures, and only after the Commission certifies that such standards and procedures are met. The act now provides in section 11501(b)(4)(B) that any intrastate rail transportation in a State which may not exercise jurisdiction thereover due to a denial of certification by the Commission "shall be deemed to be transportation subject to the jurisdiction of the Commission." Another Staggers change, in section 10501(d) of the act, provides that "The jurisdiction of the Commission . . . over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive." Pertinent to this discussion, also, in section 10102, captioned "Definitions," the term "rate" is defined in paragraph 20 as meaning "a rate, fare, or charge for transportation," and in paragraph 24 the term "transportation" is defined to include cars and other instrumentalities or equipment of any kind "related to the movement of passengers or property, or both," and services related to that movement.

¹¹ Filed October 19, 1983, and docketed as NOR 39595. A similar complaint assailing the same SoPac tariff was filed by Caltrans on January 28, 1983, and docketed as NOR 39086. It does not appear that any action was ever taken on the January complaint.

The Staggers Rail Act of 1980 is couched throughout in such general terms as railroads, rail systems, rail transportation, and rail rates, classifications, rules, and practices, and nowhere in that legislation is there to be found specific indication that the statute does or does not apply to rail passenger as well as to rail freight services. Several of the terms used in Staggers, as seen, are defined in the act to embrace passenger as well as freight service. In Ex Parte No. 388, initiated by the Commission specifically with regard to the certification of State standards and procedures for the exercise of jurisdiction over intrastate rail rates, the language used by the Commission is also general, with no reference for the most part, either specific or implied, to passenger service. The Commission's decision in that proceeding served April 22, 1981 (not printed), for instance, refers in its opening paragraph to intrastate railroad transportation in general, and at sheet 7 finds that States that did not seek certification "have lost all jurisdiction to regulate intrastate rail transportation." In a footnote in that decision, however, the Commission states the following:

The Southeastern Pennsylvania Transportation Authority filed a request to confirm its view that as a local public body providing rail mass transportation services under the exemption of 49 U.S.C. 10504 it need not seek certification. We agree with SEPTA.

Section 10504 of the act derives its definition of "rail mass transportation" from 49 U.S.C. 1608(c)(5),¹² and provides that the Commission does not have jurisdiction over rail mass transportation provided by a local public body if:

(1) the Commission would have jurisdiction but for this section; and

(2) the fares of the local public body, or its authority to apply to the Commission for changes in those fares, is subject to the approval or disapproval of the chief executive officer of the State in which the transportation is provided.

¹² The term "mass transportation" means transportation by bus, rail, or other conveyance, either publicly or privately owned, which provides to the public general or special service (but not including school buses or charter or sightseeing service) on a regular and continuing basis. 49 U.S.C. 1608(c)(5).

In this record there has been no evidence and no development of the application of the triggering provisions of section 10504, particularly paragraph (b)(2) thereof.

In the same context of passenger service as opposed to freight service under Ex Parte No. 388, it is interesting to note that in its decision in subnumber 28 served June 13, 1983 (not printed) in that rulemaking proceeding the Commission alluded to a request from the Pennsylvania Public Utilities Commission (PUC) that the I.C.C. exercise jurisdiction over Pennsylvania's intrastate railroad freight rates, and that in the decision the Commission stated that it "shall assume jurisdiction over intrastate rail transportation in Pennsylvania immediately" and that "(w)ith this notice, we are assuming jurisdiction over Pennsylvania intrastate rates." Similarly, in a decision in subnumber 21 in that proceeding served October 3, 1983 (not printed) the Commission referred to a request by the New Jersey Department of Transportation (NJDOT) that the Commission exercise jurisdiction over New Jersey's intrastate railroad freight rates, and the Commission there assumed jurisdiction over "New Jersey intrastate rates." In both decisions there is reference in a first-page "SUMMARY" to the request by PUC (or NJDOT) that the Commission assert jurisdiction over intrastate freight rates, and in both decisions under the caption "ACTION" there is the statement—Assumption of Commission jurisdiction over Pennsylvania (or New Jersey) Intrastate Rail Transportation.

Unless it is presumed that the Congress was exceedingly careless in the drafting of section 214 of Staggers, and that the Commission has been equally careless in the implementation thereof, the conclusion is warranted in light of the foregoing that rail passenger operations are within the purview of the stature and the rulemaking proceeding. The conclusion is impelled, accordingly, that the Commission's decision, and orders in the latter proceeding, to the extent appropriate, apply as well to rail passenger operations. In other words, where the Commission in its decisions in Ex Parte No. 388 has made the finding that a State, such as California, has "lost all jurisdiction to regulate intrastate rail transportation", that "transportation" by statutory definition and in the absence of affirmative indication to the contrary must be taken to include also rail

passenger operations. As seen, however, Caltrans contends that the Commission's jurisdiction does not attach automatically, that there must first be a request by the affected State that the Commission exercise jurisdiction, and that in this instance California limited its request to freight operations, thus reserving to itself jurisdiction over passenger operations. It is clear that section 11501 provides otherwise. Under paragraph (b)(4)(A) a State authority which is denied certification or which does not seek certification may not exercise any jurisdiction over intrastate rates, classifications, rules, and practices until it receives such certification, and as previously noted, under paragraph (b)(4)(B) such intrastate transportation is deemed to be transportation subject to the Commission's jurisdiction. In contract, section 11501(d), which confers upon the Commission exclusive authority under stated conditions to prescribe an intrastate rate, does not become operative until an affected rail carrier files an application, first with the State authority and then, if that entity does not take timely action, with this Commission. See discussion and footnote 1 in the Commission's decision in Ex Parte No. 388 served February 8, 1982 (not printed). Section 11501(b), on the other hand, becomes operative at the expiration of a stated time period when a State authority fails to seek or is denied the Commission's certification, and jurisdiction over intrastate transportation passes to the Commission. Such jurisdiction otherwise would pass into a jurisdictional void, and in either case, insofar as these trains are concerned, would place the affected railroad, SoPac, beyond the regulatory reach of California.

The Judge concludes and finds that, at present and at least since February 9, 1983, the date the petition herein was filed, this Commission has jurisdiction pursuant to section 11501 of the act over intrastate transportation provided by SoPac in California, including rail passenger transportation and specifically the Caltrains here in issue, where lies the public convenience and necessity with regard to the operation of these trains and whether continued operation of the trains will constitute an unreasonable burden on SoPac's interstate operations or on interstate commerce. This conclusion and finding that the Commission has jurisdiction is made solely on the basis of the jurisdiction conferred on the Commission by section 214

of the Staggers Rail Act of 1980, enacted October 14, 1980, and the Commission's decision in Ex Parte No. 288, served April 22, 1981, and subsequent publications in the Federal Register on February 8, 1982, and May 11, 1982. This conclusion and finding is made without regard to proceedings before CPUC in connection with these trains held on or after April 29, 1981, the effective date of the Commission's finding in Ex Parte No. 388 that the State of California has lost all jurisdiction to regulate intrastate rail transportation, and without regard to decisions and orders issued by CPUC on and after that date. This conclusion and finding is also made without regard to, but not in derogation of, the decisions and orders regarding these trains issued by the California courts or by the Federal courts in California which accorded to the California court decisions *res judicata* effect in the Federal courts. As previously mentioned, the decision of the California Supreme Court on December 23, 1981, was addressed solely to issues relating to the CPUC proceedings and the decisions and orders of CPUC with regard to these trains, and the decisions of the District Court and of the Ninth Circuit on review, while giving *res judicata* effect to the California decision, pointedly did not reach the issue of preemption of state by federal law. It is that issue and only that issue, never considered on the merits by the courts, that is addressed in the Judge's conclusion and finding above, and the Judge here determines that California jurisdiction in this matter has been and is preempted by federal law and that, consequently, jurisdiction herein resides in this Commission. It is well established that jurisdiction once acquired by the Commission under law is not lost because of subsequent state actions, although such actions might well render the Commission's jurisdiction moot. Without question, the subsequent authorization by CPUC of discontinuance of the operation of these trains would constitute such an action, but the authorization by CPUC merely of the suspension of operations manifestly did not. Compare *Pennsylvania Ry. Co. Discontinuance of Service*, 317 I.C.C. 5 (1961). Accordingly, consideration will now be given to the merits of SoPac's petition.

SoPac asks the Commission to find that the public convenience and necessity permit the permanent discontinuance of these trains, and in support SoPac relies on what Caltrans,

opposing this request, agrees are the traditional considerations in a passenger train discontinuance proceeding, namely, the measure of public support for and public usage of the subject trains. Between these opposing parties there is no material dispute as to the pertinent statistics or numbers, that is, the population of the territory traversed by the trains, the ridership experienced on the trains, or the extent of the public participation in these discontinuance proceedings. The parties appear to agree that the population is large, the ridership low, and the public participation minimal. The route of the trains traverses the San Fernando valley and Los Angeles basin of lower California, major areas of industrial expansion and population growth. The uncontroverted evidence shows that during an 89 commuter-day period from October 19, 1982 through February 28, 1983, a total of 27,881 passengers were carried in 355 trains, a daily ridership of about 79 passengers per train. This averages out to about 313 passengers per day (159 to Los Angeles and 154 from Los Angeles), with most inbound passengers boarding at stations in operation the full 89 days; Oxnard (43 passengers), Simi (84), and Panorama City (18). There is indication that prior projections by Caltrans had visualized a daily home-to-work ridership from nine operating stations of more than 1,100 commuters in each direction.

SoPac and Caltrans are in sharp disagreement as to the causes of the poor patronage and limited public support, and in even sharper disagreement as to who is responsible. Insofar as public support for these trains is concerned, less than a dozen public witnesses appeared to oppose the discontinuance, only one of which represented a community (Simi). Half of these public witnesses had actually used these trains, and their comments about the service varied from "more than adequate" by one passenger to "terrible" and "undependable" by others. Several participated in "Save the Caltrains" movements striving, with little success apparently, to increase ridership on the trains. SoPac notes that the trains carried commuters only to and from a point in the central business district of downtown Los Angeles, from and to which point commuters had to use supplemental transportation to and from their places of employment. SoPac and Caltrans agree that the poor patronage is attributable at least in part to the fact that feeder bus services

never were developed to carry passengers to and from Oxnard, Simi, and the other commuter stations.

Caltrans alleges that there was low initial ridership because SoPac provided an erratic, unreliable service, and failed to cooperate in placing in operation the several commuter stations. A Caltrans official stated that there were at least two suspensions of service by SoPac, that the trains frequently operated late, that passengers never were certain from day to day that the trains were going to run or what time they would arrive at their destinations, and that several of the stations were never opened for service. "Five months of operation under publicized adversity is not a sufficient test of ridership", Caltrans asserts, and it insists that "the actual ridership is irrelevant", moreover, because this train service was conceived as a demonstration project to test the market for ridership and to gauge the need for public subsidization. SoPac alleges, on the other hand, that the trains were not used because they are not needed by the traveling public, that they are a luxury, and not a necessity, for those who did use them, and that the lack of enthusiasm for these trains reflects simply the overwhelming preference of Californians for the private automobile. SoPac contends that this train service was a SoPac service only to a very minor degree, since Caltrans determined the fares to be paid by the passengers and collected them, and Caltrans selected, designed and constructed the commuter stations and unilaterally drew up the train schedules with no prior consultation with SoPac, and with no effort made, according to SoPac, to reconcile scheduling conflicts with existing SoPac freight and Amtrak passenger trains. To the extent that there were in fact delays and inconsistent service, SoPac insists, these were attributable to unresolved scheduling conflicts which SoPac was powerless to avert, and SoPac points out that it was largely on the basis of potential conflicts in scheduling of trains on the carrier's coastal line that SoPac vigorously opposed the institution of this train service. SoPac and Caltrans appear to agree that this proposed discontinuance should be subject to "strict scrutiny" because it involves the last passenger trains on a line, but SoPac emphasizes that Amtrak will continue to operate intercity passenger trains on this line, although at non-commuter hours of the day.

SoPac and Caltrans also agree that this discontinuance would not likely have adverse effect on carrier employees. However, SoPac alleges that the Commission in any event has no authority under the statute to impose protective conditions for employees who may be affected adversely by a passenger train discontinuance. As noted, railway labor representatives appeared in opposition, but they adduced no evidence. Regarding evidence shows that locomotives used on these trains consume an average of 843.6 gallons of diesel fuel per day, or a daily average of 5.56 gallons per passenger. SoPac contends that this usage, the equivalent of 13.5 passenger miles per gallon, compares unfavorably with usage by intercity buses (144 passenger miles per gallon), 6-passenger vanpools (90 miles per gallon), or driver-only private automobiles (20 miles per gallon). According to SoPac, moreover, even if the ridership on the trains increased tenfold, fuel consumption per passenger would yield no more than 57.7 passenger miles per gallon, and these trains actually waste rather than conserve energy, SoPac contends. SoPac alleges that the operation of these trains contributes to the region's air pollution because of the excessive fuel consumption, and that discontinuance of the trains would have no adverse environmental affects. On this aspect Caltrans states only that the operation of these trains was exempted from environmental review at the State level.

SoPac alleges that there is adequate alternative transportation available to persons in the area, primarily transportation by automobile, including carpools and vanpools. Unlike some other areas where the public has come to lean on rail commuter services, in the metropolitan area of Los Angeles the public has long ago turned exclusively to the highways, and the freeways in this area have become a way of life. These trains, in fact, were implemented by Caltrans to test whether commuters would forgo the convenience of their cars for the train, and SoPac insists that months of actual operation demonstrate that most commuters would not. These commuters used the highways before the trains came, according to SoPac, and since the suspension of operations have returned to the highways, and the thrust of the evidence of the few riders who came to the hearings, SoPac insists, is that this mode is available to take them to and from their jobs. SoPac contends that no

showing has been made that loss of the trains would work a severe hardship on any Caltrain rider. Between Simi and Los Angeles, in fact, a charter bus service is now in operation, operated without public subsidy, with schedules comparable to the Caltrains and lower fares. SoPac also cites numerous commuter bus services operating between Los Angeles and adjacent points, including various points formerly served by these trains and others. Also, the record shows, carpool and vanpool arrangements have been set up by computer and by certain employers in the area.

SoPac and Caltrans differ on the effect on the carrier's financial condition by the operation of the trains. Caltrans alleges that in ordering the carrier to operate this service CPUC authorized a rate of return on these operations of more than 7.5 percent, a return significantly higher than SoPac's return for the past ten years, and Caltrans insists that if the service is reinstituted on this premise the operations will affirmatively contribute to the carrier's revenue needs. In this connection Caltrans states that subsidization of this service by California, while "not a certainty, it is not remote," and that local public agencies are waiting only for the amount of the subsidy needed to be determined before they come forward. SoPac states, on the other hand, that the carrier's financial condition is "extremely weak", that its rate of return in recent years has been at a depressed level, averaging 1.41 percent, and that in 1982 its operations resulted in a deficit rate of return. As later more specifically discussed, SoPac alleges that its revenue losses sustained in operation of the Caltrains have been substantial, and that the carrier cannot continue to dedicate resources to operations such as these trains which fail to contribute to the company's revenue needs. A failure to authorize discontinuance of the trains, SoPac insists, will expose SoPac to continuing losses in violation of both the letter and the spirit of Staggers and the national transportation policy.

SoPac categorically denies that it downgraded service on the trains to discourage ridership, and insists that the record shows that it made reasonable efforts, consistent with its overall obligations, to provide satisfactory passenger service. SoPac states that the record shows relatively few, isolated instances of train delay, and contends that these were largely due to

inevitable conflicts by the Caltrains with SoPac's heavy freight operations on the line and Amtrak passenger trains. SoPac denies that its own 2-day suspension of operations in early February 1983 contributed to any instability of service, and emphasizes that SoPac was only discharging its statutory obligation to effect timely collection of tariff charges and by suspending service when Caltrans refused to pay the published tariff charges.¹³

The second finding that SoPac asks the Commission to make is that continuing this transportation service will constitute an unreasonable burden on the carrier's interstate operations and on interstate commerce. Much of the testimony and evidence in this proceeding relates to this burden as viewed by the opposing parties; SoPac strongly insists that there is such an unreasonable burden here, and Caltrans is adamant that there is not. In the latter regard, Caltrans alleges that insofar as intrastate train discontinuances is concerned the governing statute is remedial and should be construed liberally to effect its obvious purpose, here to permit the discontinuance of services for which allegedly there is no longer sufficient public need to justify the heavy financial losses involved. Caltrans takes the position that even the most liberal interpretation of the statute will not justify its application to trains which are neither providing current transportation nor incurring present costs for the railroad. Caltrans points out that these trains are not running and hence, Caltrans contends, are not creating costs for the carrier. According to Caltrans the carrier's costs since the date operation of the trains was suspended add up to zero, and the costs which SoPac is here seeking to avoid are costs connected with a future resumption of the service, a service resumption that Caltrans insists will not occur until CPUC resolves all questions of cost and subsidy, and insures that SoPac's deficits will be compensated by public subsidy. SoPac responds that there is a present and continuing burden on the carrier even during the suspension of operations. There is the direct burden imposed by CPUC's continuing orders that SoPac maintain and protect the idle stations and facilities constructed

¹³ SoPac and its president were found in contempt and fined \$16,000 by CPUC for suspending operations under the carrier's tariff without first securing permission from CPUC.

on railroad property by Caltrans, a burden reflected in reduced or foregone rentals on SoPac Properties, but primarily in public liability exposure and concomitant high insurance and security costs. According to SoPac there is also the burden imposed on the carrier by the constant threat of resumed operations, a burden imposed in terms of preemption of valuable morning and evening time slots on the coastal line for the commuter trains. The Caltrain schedule forced on SoPac required the carrier to adopt the practice of "slotting" its freight services around the Caltrains, which meant delaying and impeding profitable services which were helping SoPac to achieve revenue goals. In the present situation SoPac can start up new, potentially profitable but potentially conflicting freight services on this line and in these time slots only at its peril. SoPac insists, moreover, that the unreasonable burden proscribed in the statute is not limited to the operation of the trains, that the term "transportation" as used in section 10909(c) and as defined in section 10102 embraces far more, including as here pertinent all the constraints and limitations imposed under CPUC's continuing orders in this matter.

For the most part the unreasonable burden herein alleged is stated in terms of costs. These are largely variable, out-of-pocket costs of the Caltrain operation for which the carrier is unreimbursed or inadequately reimbursed, reflecting past operations but projected for the future if SoPac is forced to resume operations. The position stated by the railroad is that California by its actions, and by the actions that it may take at any time under the jurisdiction that it purports to hold over these trains, will force the carrier to operate trains at compensation less than the cost of such operations and less than provided in SoPac's tariff on file with this Commission, operations that would afford special, local benefits for California residents but would preclude the railroad from using its lines productively and would impede the carrier in its search for revenue adequacy. This, the carrier asserts, would frustrate the purposes and objectives of congress in enacting Staggers, and thus this constitutes an impermissible and unreasonable burden on interstate commerce. However, SoPac has also calculated the specific costs of the Caltrain operation in an analysis prepared primarily by an analyst (Wilson) in its Bureau of Trans-

portation Research on the basis of cost and operations data introduced in evidence by its chief train dispatcher in Los Angeles, its senior land agent, its treasurer, and other testifying officials. A summarization of SoPac's expenses associated with the subject trains was introduced as Exhibit H-51 and is reproduced in the table below:

Table 1

**Summary of Expenses Associated with Operation of
Commuter Train Service Between Oxnard and Los Angeles**

<u>Description</u>	<u>Source</u>	<u>Expenses</u>
1. Maintenance of Ways and Structures	Unit cost basis	\$ 13,294
2. SoPac locomotive maintenance	Directly assigned	73,326
3. Locomotive rental—Amtrak	Directly assigned	43,050
—SoPac	Directly assigned	23,301
4. SoPac coach maintenance	Directly assigned	31,099
5. Mechanical services at Oxnard	Directly assigned	56,204
6. Train and engine crews	Directly assigned	203,613
7. Transport SoPac equipment to Los Angeles	Directly assigned	21,234
8. Police and security	Directly assigned	71,408
9. Freight train delay	UMLER and RI data	26,114
10. Property rental	Special study	319,145
11. Lost Amtrak incentive payments	Directly assigned	8,538
12. Casualty and liability	Special study	476,425
13. Legal expenses	Directly assigned	650,928
14. Relocate Santa Susana team track	Engineering estimate	55,700
15. Engineering costs	Directly assigned	46,925
16. Division staff	Directly assigned	51,894
17. Cost to remove station facilities	Engineering estimate	99,255
18. Miscellaneous	Directly assigned	1,204
Subtotal		\$2,272,658
19. Variable General Overhead ¹		41,433
TOTAL EXPENSES		\$2,314,091

¹ General overhead at 10.39 percent, exclusive of Law and Police/Security costs, applied to lines 1, 2, 4, 5, 6, and 7.

Caltrans studied SoPac's costs, as above and generally, in analyses prepared by a transportation consultant (Brophy), an economic consultant (Whitehurst), and various officials and employees of Caltrans who came to testify herein. On the basis of these analyses and cross-examination of SoPac's witnesses, Caltrans alleges on broad review that SoPac's costs as above are grossly excessive, and that the carrier's actual expenses, at best, are about 25 percent of what it claims. Caltrans alleges that no showing has been made that these costs in any way affected the interstate operations of SoPac or interstate commerce, and that all of these costs can be placed in four categories, namely, paid, speculative, not savable, or inaccurate. Caltrans notes that several of the items in Table 1 are one-time cost items (station removals and relocations of track, for example), and contends that other cost items cannot be evaluated in connection with resumed operation of the trains because SoPac has presented no evidence of the parameters of the resumed operations. Each of the individual cost items put forward by SoPac's witnesses was examined and criticized by Caltrans' witnesses, but protestant's position, as stated, is that even if valid these expenses relate only to past operations and do not represent any burden on the carrier, present or potential. SoPac states its position that it is not necessary to resolve the differences between the costs as calculated by the carrier's witnesses and by protestant's witnesses in order to reach the conclusion that there is an unreasonable burden cast upon the railroad's operations and on commerce, and SoPac contends that this burden will persist until the Commission "cuts off the service obligation which CPUC seeks to keep alive for these trains."

According to SoPac its expenses in connection with the operation of the trains for some five months exceed by more than \$1.9 million the sums paid to it or committed under the subsidy, and the carrier states that on a cash-out basis this demonstration project has cost it \$1,895,691. If the railroad's expenses are expressed in terms of the basic compensation charge shown in Item 10 of its tariff, \$588,200 per month or fraction thereof, SoPac contends, the loss was even greater. SoPac asserts that Caltrans has paid to it, to date, \$209,520 for

train operations and \$46,926 for various start-up costs, and has committed an additional \$66,351 for locomotive rentals. Caltrans' computations differ, as shown below:

Table 2
Los Angeles-Oxnard Commuter Service
Operating Costs
October 18, 1982 to March 1, 1983

1.	Various operating costs, funds expended by Caltrans	\$621,686	\$ 621,686
2.	SoPac's operating costs, at about \$70,000 per month	\$315,000	
3.	SoPac's tariff charges billed to Caltrans		\$2,978,288
4.	Total expenditures	\$936,686	\$3,599,974
5.	Less, estimated fare revenues	107,115	107,115
6.	Net expenditures	\$829,571	\$3,492,859

Caltrans thus estimates total expenses of less than \$1 million as compared with the much higher estimates by SoPac. However, consistent with the views expressed on brief by the opposing parties it will not be necessary in this decision in connection with the different specific cost items to resolve the differences between SoPac and Caltrans, differences that are largely irreconcilable not only in amounts but also in the applicability of many of these cost items, in order to make the statutory findings herein. Nor will it be necessary in discussing many of these cost items to examine them in any great detail. In essence, the record will show either that there is or that there is not a substantial and unreasonable burden, and if the record shows that there is, the precise amount of that burden is of no material significance in this proceeding.

With regard to the specific expenses summarized by SoPac as shown in Table 1, Caltrans shows its own calculation of these

cost item amounts, and indicates which are paid or being paid and in what amounts, as set forth in Table 3 below:

Table 3
Oxnard-Los Angeles Commuter Service
Caltrans Analysis of SoPac Expenses

Description	SoPac Claim	Caltrans Claim		
		Being Paid	One-Time	Corrected
1. Maintenance of Ways and structures	\$13,294			\$ 9,120
2. SoPac locomotive maintenance	73,326			63,577
3. Locomotive rental,				
Amtrak	43,050	\$ 43,050		
SoPac	23,301	23,301		
4. SoPac coach maintenance	31,099			31,099
5. Mechanical services at Oxnard	56,204			56,204
6. Train and engine crews	203,613			203,613
7. Transport SoPac equipment to Los Angeles	21,234	10,618		
8. Police and security	71,408		35,465	
9. Freight train delay	26,114			235
10. Property rental	319,145			18,319
11. Lost Amtrak incentive payments	8,538			0
12. Casualty & liability	476,425			0
13. Legal expenses	650,928		6,509	
14. Relocate Santa Susana team track	55,700	55,700		
15. Engineering costs	46,925	46,925		
16. Division staff	51,894			0
17. Cost to remove station facilities	99,255		10,550	
18. Miscellaneous	1,205			540
Subtotal	\$2,272,658	\$179,594	\$52,524	\$382,707
19. Variable General Overhead	41,433	0	0	0
TOTAL EXPENSES	\$2,314,091	\$179,594	\$52,524	\$382,707

Other than in concept, as stated, Caltrans differs with SoPac only in amount in connection with several of these cost items. One such item is property rental, for which SoPac claims a total amount of \$319,145. SoPac's valuation was by its senior land agent (Watkins) who computed what he construed as the fair value of the sites on which Caltrans constructed stations and the sites which CPUC ordered SoPac to hold for such use. To this Watkins added his estimate of actual cash losses

suffered by SoPac in connection with other, adjacent rental properties of the railroad as a result of Caltrans' activities on the line in terms of interference with SoPac's efforts to place and keep these properties under lease. Caltrans presented the testimony of an experienced appraiser (Kanaly) who made an exhaustive appraisal of the SoPac properties based on the demonstrated fair market values of comparable properties in the area, and arrived at his valuation of \$3,185. There is no reconciliation possible of these widely divergent appraisals, and the credibility of each hinges upon the expertise of the appraiser and the acceptability of the methodology used by each. Police and security cost is another such item. SoPac stated that the route of the Caltrans is through high-vandalism areas, with layovers of equipment at isolated locations, and that this required regular patrol activity on the part of SoPac's security forces. Additionally, the stations and facilities constructed by Caltrans are alleged to be attractive nuisances, and their close proximity to the tracks is said to make the situation particularly dangerous. Caltrans regards about half of SoPac's costs for this item to be directly attributable to the commuter service, relating to the cost of protecting the equipment while laying over at Oxnard. The remainder, according to Caltrans, relates to the costs of patrolling a right-of-way used by many trains and only to a small extent by these commuter trains. Caltrans contends, moreover, that SoPac failed to furnish data that would permit a comparison with security costs prior to the inception of the Caltrans and thus give a more accurate picture of the impact of these trains on police and security.

Other cost items instanced by SoPac are criticized as not savable by the proposed discontinuance, among these variable general overhead, components of which are alleged by Caltrans to reflect services that are not incrementally attributable to the institution and operation of the commuter trains, or are duplicative of charges claimed by SoPac elsewhere, or are not allowable under governing standards. SoPac responds that this rejection is unwarranted and based upon faulty assumptions, in that the carrier calculated this expense in conformance with accepted cost methodology, avoiding all duplications. Another such expense is division staff expense, which Caltrans alleges is

not savable because it does not represent the costs of new staff hired for this service or staff to be eliminated as a result of discontinuance. SoPac points out that it nevertheless reflects pro rata allocation of time and work by division staff members actually incurred in connection with the trains. Caltrans also alleges that past legal costs of SoPac are not expenses savable by discontinuance of the trains. SoPac's legal expenses, in amount the largest item instanced, are criticized as being entirely speculative, but primarily as being an expense that is not recognized by the Commission under governing standards in train discontinuance proceedings. Caltrans points out that this is an overhead expense, and that the Commission has frequently held in train discontinuance cases that overhead expenses would continue to be incurred by the carrier after discontinuance has taken place, and thus are not really savable. In this regard Caltrans cites *Great Northern Ry. Co. Discontinuance of Trains*, 336 I.C.C. 477 (1970), among other decisions.

Caltrans' cost and economic consultant, Whitehurst, had concluded in his analysis that about 99 percent of SoPac's claimed legal expense is not reimbursable expense related to providing of this commuter service, that SoPac's legal, and other staff expenses, were incurred, if at all, in opposing the institution and operation of this train service and not in benefitting it, and that Caltrans has no responsibility to reimburse the carrier for such expenses. Whitehurst's thesis, advanced by Caltrans in this case, is that the costs incurred by SoPac related to this train service must be computed on an avoidable cost approach basis, utilizing the "Standards for Determining Commuter Rail Service Continuation Subsidies" promulgated by the Rail Services Planning Office of the Commission (the RSPO standards), developed by the Commission as required under the Regional Rail Reorganization Act of 1973. The RSPO standards were adopted by the Commission in 1976 and since refined and clarified, and have been used as a basis for reimbursement by public authorities in the Northeast and Midwest for continuation of rail commuter services under subsidy. As here pertinent, CPUC in its several decisions relating to this commuter service directed that consideration be given to the RSPO standards as a reasonable method of

calculating costs in this case, and CPUC is itself directed in the Public Utilities Code of California in determining reimbursement to railroads for the operation of passenger service not to exceed compensation calculated pursuant to RSPO standards. Caltrans alleges that reimbursement of SoPac on this basis will compensate SoPac on a level that meets or exceeds the minimum reasonable rate threshold specified in the Staggers Act, which requires, among other things, that the basis of compensation must contribute to the going concern value of the carrier by equaling or exceeding the variable cost of providing the transportation. With regard to SoPac's legal expenses claimed in particular, Caltrans takes the position that these expenses for the most part were incurred, if at all, in litigation for the purpose of fighting this service rather than in negotiations to implement the service or in administering it. Caltrans acknowledges that under RSPO standards general legal expenses and legal expenses incident to administrative activities are reimbursable, but points out that participation in rule-making proceedings is not. In the same vein, according to Caltrans, it would be inequitable to require a public authority to reimburse a railroad for its legal costs in litigation to oppose the institution and operation of a commuter service such as this. In his analysis Whitehurst had estimated, in the absence of additional data requested from the railroad, that SoPac's legal expenses reimbursable under RSPO standards would total no more than \$10,000.

SoPac denies that its claimed legal expenses were incurred solely in opposing the Caltrains, and it states that these expenses were incurred in litigation and activities supportive of the carrier's rights, its right to protect its existing business from adverse impact, and its right to have necessary capital improvements funded to enable it to operate freight services during time periods and over line segments preempted by the commuter train operations. SoPac contends that it was forced to resort to expensive litigation to enforce its rights, rights that it insists are cognizable under RSPO standards. In the latter regard, SoPac appears to agree that RSPO standards, now published at 49 USC 1155 *et seq.*, have been accepted as a measure of the burden imposed on a carrier, but SoPac points out that the test here is whether an *unreasonable* burden is imposed on the

carrier, and SoPac contends that there is no requirement, statutory or otherwise, that only RSPO standards apply as the measure of this burden. This is particularly significant in this case according to SoPac, because there had not been prior commuter train service on this line in this region, and there was no railroad mechanism set up to handle these trains. SoPac states that RSPO standards were first developed for the purpose of determining necessary subsidies for the continuation of essential, long-time commuter services in the East, and that these standards contemplate the negotiation by carriers and public agencies of a "facilities utilization plan" and a "man-power utilization plan", to identify, respectively, the road and equipment properties and the labor forces used in providing commuter services. In the situation of Oxnard-Los Angeles, according to the railroad, there was no time to develop such plans because the commuter operations were thrust upon SoPac suddenly, with the force of law, and men and materials had to be immediately assigned to the task of setting up and operating these trains. The new train service had to be given priority, moreover, while at the same time, due to declining revenues, work reallocations and force reductions were being undertaken throughout SoPac's system. As a consequence, the costs of the commuter train operation could not be developed in strict compliance with RSPO standards, but SoPac contends that there is reasonable compliance and that the expenses instanced are as accurate as possible in the circumstances. Insofar as concerns legal expenses in particular, SoPac insists that these are reimbursable under RSPO standards, and in support the carrier offered the testimony of Hartsell, a former official of Conrail who administered that giant railroad's commuter service contracts on the eastern seaboard. Hartsell stated that Conrail was fully reimbursed by the subsidizing public authority for its legal expenses, including both in-house and outside counsel, in connection with the operation of commuter trains, including new, start-up operations as well as continuation of existing operations. The witness stated that these were expenses that would not have been incurred but for the commuter train service request. According to this witness reimbursement under RSPO standards would embrace not only all costs attributable to delays caused by new commuter services, but also legal expense to collect costs of removing structures and

facilities usable only for commuter services upon the termination of such operations. It is SoPac's position that here, as in the Conrail situation, the railroad is entitled under law to reimbursement for all expenses actually and reasonably attributable to the imposed commuter service, including legal expenses and including a reasonable rate of return. Caltrans interprets the Conrail situation as supporting its own view that under RSPO standards carriers may be reimbursed only for avoidable costs of providing commuter services and not for the costs of discontinuing such services.

Another major expense instanced by SoPac is for casualty and liability, almost a half-million dollars. Caltrans regards this amount as pure speculation, inasmuch as the record shows that the carrier purchased no insurance in connection with this commuter service and experienced no claims of liability during the period of operations. Even the specific amounts underlying SoPac's claim are assailed by Caltrans as speculative because the carrier relies on what Caltrans characterizes as "premium indications" rather than actual "quotes" by insurance carriers. According to SoPac on the other hand, operation of the Caltrains, and indeed even the existence of the Caltrain facilities, imposes on the carrier "a very substantial burden" in terms of liability. That burden is a consequence of the fact that Caltrans accepts no liability in connection with the Caltrains, and would refuse to settle any claims arising therefrom. This, despite SoPac's contention that RSPO standards recognize liability risk as an avoidable cost of commuter service, and that these standards require the subsidizer of a commuter service to pay 100 percent of casualty and liability expenses attributable to the operation of such trains. SoPac's tariff, moreover, provides in Item 20 that Caltrans as Transportation Project Operator (TPO) must assume all liability risks arising out of "the presence or operation" of the trains. As seen, however, Caltrans does not recognize the validity of this tariff and has accepted no liability thereunder, and it appears that Caltrans would recognize only such liability as it might accept under contractual arrangement with SoPac, an arrangement that does not presently exist. The carrier insists that it bears the liability burden in any case, in the absence of such arrangement and acceptance and even if such arrangement and acceptance

existed, because aggrieved plaintiffs would invariably pursue their claims against SoPac, inasmuch as "it is infinitely easier to collect large judgements from an unwilling but solvent corporation than from an unwilling California state agency", particularly since a judgement against the state agency is of little value unless money is appropriated to pay it. A railroad official described SoPac's risk in operating a passenger train service in the Oxnard-Los Angeles area as extremely high, not only as to the basic issue of liability but also as to the measure of damages, said to be of a magnitude in southern California unheard of just a few years ago. The carrier's risk is compounded by the liability exposure created by the station platforms and parking lots constructed on SoPac's line by Caltrans. These facilities attract vandals, trespassers, and other potentially troublesome activities, and in conjunction with high-speed train operations can pose a substantial potential for casualty loss for SoPac. SoPac estimates that payment of about \$10,000 per month would be appropriate compensation for the risks imposed on the railroad by Caltrans' improvements. Regarding its overall casualty and liability risk, SoPac notes that the railroad maintains a catastrophic loss policy to provide insurance for major losses, losses in excess of its deductible per occurrence, \$8 million, and that for risks or losses below that amount SoPac is, in effect, a self-insurer. SoPac contends, however, that the measure of the carrier's risk expenses if operation of the trains is resumed is the premium that commercial insurers would charge for this coverage. Quotations were obtained from several major brokers for coverage up to the threshold of SoPac's catastrophic loss policy, and based on these quotations and the component of the catastrophic policy expense represented by these trains, as well as the railroad's costs in handling small claims not covered by these policies, SoPac estimates the total value of its risks of liability exposure at \$106,250 per month. Based on the same facts used by SoPac, an insurance official of the State of California estimated that comparable coverage could be obtained at a cost of under \$40,000 per month, and to cover the station facilities only, at a cost of less than \$200 per month. As stated, however, it is Caltrans' basic position that SoPac's exposure and risk is entirely speculative.

Freight train delay is an expense item of relatively modest amount, but it was nevertheless the subject of considerable evidence, analysis, and dispute. This expense and the expense attributed to lost Amtrak incentive payments, among others, relate directly to the fact that SoPac's coastal line between Oxnard and Los Angeles is for 55 miles, between Oxnard and Burbank Junction, a single-track line, with automatic block signals but without centralized traffic control (CTC), a line on which trains meet and pass each other by the use of sidings or passing tracks spaced along the railroad. The movement of trains on this 55-mile segment is controlled by rulebook, operating timetable, and written train orders issued on this line only at Los Angeles, Burbank Junction, and Oxnard. Thus, trains entering this segment can obtain meeting, waiting or passing instructions only before they enter, and operating procedures normally cannot be changed or revised after they enter this segment. SoPac's trains are equipped with radio, but on its passenger trains, including these commuter trains, the two-way radio equipment is of limited power, on which the train conductor may be able to receive messages but with which "he can't transmit very far." SoPac's rules permit the relaying of train orders by radio, but only "helping" and not restricting orders, and when train orders are given by radio to a passenger train the train has to stop and the engineer has to copy the order and repeat it back to the train dispatcher, all of which entails delay to the progress of the train. As a consequence of this, and of the fact that transmission of train orders by radio entails extra pay to the train engineer or conductor, radio is used to transmit orders to trains only in emergencies or to avoid serious delays.

Each day, the 55-mile, Oxnard to Burbank Junction segment handles between four and twelve through freight trains as well as several road switcher assignments and four Amtrak passenger trains, all on a single track. The physical characteristics of this line, in terms of grade and curve, and potential rock slides, present possibilities of mechanical failure and train delays that disrupt train schedules. There is a high concentration of industrial activity, particularly between Burbank Junction and Chatsworth, and road switchers serving these industries may delay through train services and may, conversely,

be interrupted by through train services. Most of the sidings on this line were built to accommodate yesterday's 3,500-foot trains, and it is only the siding at Santa Susana, 25 miles up the line from Burbank Junction, and at Oxnard, that can handle today's 7,000-foot train, the long, heavy train that makes money for SoPac. Precise performance is rarely possible on passenger trains, moreover, inasmuch as Amtrak trains are subject to mechanical delays, baggage delays, delays in loading or unloading passengers, and other delays, so that the times of their movements are not always predictable. Due to these and other factors through freight trains are often "slotted", that is, to avoid potential delay impact on passenger services the freight trains arriving at either end of this line segment at times of the day when there is a potential for conflict with passenger trains on the line segment are held back until the line is clear for a non-stop run across by the through freight trains. Thus, a Los Angeles-bound through freight train that would otherwise leave Oxnard at 5:00 a.m. during the period of operation of the Caltrains, would be held at that point until both morning commuter trains would be clear of Burbank Junction before the long freight train could overtake them. The net effect of this is delay to SoPac's existing freight services, the revenues from which pay SoPac's bills. The potential for conflict on this single-track segment also inhibits SoPac in the development and promotion of new, competitive services. As noted, this impediment and potential impediment to the carrier's existing and developing freight traffic was a primary basis for SoPac's struggle to avert and now to void the commuter service.

The contract under which Amtrak operates its passenger trains over this Oxnard-Los Angeles line provides, among other things, that SoPac's compensation hinges upon the "on-time" performance of the Amtrak trains on this line. That contract also accords priority to Amtrak trains over local, short-haul and suburban passenger trains such as the Caltrains. According to SoPac, on one occasion during the period the Caltrains were operated one of the commuter trains caused an Amtrak train to run late, to fail on-time performance, and that single late arrival of the Amtrak train under the penalty provisions of the contract reduced SoPac's compensation by \$8,538. Caltrans' transportation consultant, Brophy, showed that the Amtrak train,

already late when it encountered a disabled commuter train, was delayed only 13 minutes by that encounter out of the 64 minutes on which the lateness penalty was predicated, and protestant contends that based on the encounter alone the lateness penalty would have been zero dollars.

Caltrans differs with SoPac in the matter of freight train delay expense primarily as to amount, and there is wide variance between this expense as finally computed by SoPac, \$26,114, and as computed by Caltrans, \$235. This variance stems in large part from differences in their respective treatment of unit costs and adjustments made to reflect unit costs expressed on an avoidable cost basis. As calculated by Caltrans this expense also reflects Brophy's analysis of SoPac's underlying data and of SoPac's procedures in avoiding or minimizing delays incident to train movement conflicts on the single-track line. Brophy "detected no serious disruption" of SoPac's freight service attributable to commuter train operations on the line. According to Brophy, out of some 654 hours of delay attributed by SoPac to the operation of the commuter trains, only about 134 hours of delay could be interpreted as resulting from the Caltrain operations. Brophy testified that much of this delay could have been eliminated by improved procedures on the part of SoPac. SoPac persists in its own evaluation, however, insisting that any errors perceived in its extensive study of thousands of train and engine movements would be offset by other incidences of delay that might have been missed in the study.

No essential purpose would be served here by further discussion of the wide range of differences shown to exist between SoPac and Caltrans, differences in amounts and in concepts relating to the statutory issue of whether operation of these trains in the past and in the future has constituted and will constitute an unreasonable burden on the carrier's interstate operations or on interstate commerce. Some of these differences are complex and appear to be insoluble on this record; others are as simple and as basic as the opposing views of these parties as to whether operating expenses for which, Caltrans insists, the railroad will be reimbursed, may be considered to be a present burden on SoPac's operations. Caltrans regards its

own stated willingness to reimburse the carrier for particular expenses as eliminating any possible burden reflected by those expenses. SoPac regards this willingness to reimburse as something considerably less than money in the pocket, and contends that the burden remains unless and until reimbursement is actually effected. The Judge sees merit in the latter view, and notes that normally, in a proceeding of this nature, an issue such as this would be of little consequence. Here, however, the record indicates that in California, including the highest levels of State government, serious controversy exists as to whether these commuter trains should be funded at all, and in this context the issue takes on some significance. Another difference, a major difference, pertains to the RSPO standards referred to by the parties. This is a difference that cannot be resolved or reconciled on this record, and in fact need not be. These standards can be defined and analysed only on a comprehensive record in an appropriate proceeding. For the purposes of the instant proceeding all that is required is that the record be adequate, in connection with these commuter trains, for a determination of (a) whether the public convenience and necessity permit the proposed discontinuance, and (b) whether continued operation of these trains would constitute an unreasonable burden on the carrier's operations or on commerce. The Judge concludes that for this purpose the record is adequate, and makes the required findings below.

GENERAL DISCUSSION, CONCLUSIONS, AND FINDINGS

The Supreme Court has stated that where a railroad engages in both interstate and intrastate commerce, the two services are inextricably intertwined, the same instrumentality serves both. *Colorado v. United States*, 271 U.S. 153, 164 (1926). That court later held in *Southern R. Co. v. North Carolina*, 376 U.S. 93 (1964), that the statutory scheme "prescribes precisely the same substantive standard to govern discontinuance of either interstate or intrastate operations", and that "(a)ll that need properly be considered under this standard . . . is what effect the discontinuance of the specific train or service in question will have upon the public convenience and

necessity and upon interstate operations or commerce." (page 103 *et seq.*). See, also, *Norfolk and Western Railway Co. v. United States*, 316 F.Supp. 1396 (1970). That single Federal standard, incorporated now in section 10909(c), still governs. See *Consolidated Rail Corporation—Discontinuance*, 360 I.C.C. 324 (1979). That standard was adopted to enable railroads, burdened with a passenger train service that fails to pay its way and for which there is no substantial public demand, to terminate that service. Inasmuch as the continued operation of an unused and unneeded service may engender deficits which can impair the ability of a carrier to serve the public, the Commission must carefully consider the carrier's financial condition and its ability to absorb prospective deficits. Other considerations must be the population of the region served by the trains and the commuting practices in the communities traversed, the alternate transportation services available and their ability to absorb additional patronage, and the general effect of a discontinuance on the well-being and development of the region, on carrier employees, and on the carrier's financial prospects for the future. Thus, in determining whether continued operation of particular trains will be unduly burdensome to the carrier or to interstate commerce and whether the public convenience and necessity permits the discontinuance of such trains, the future prospects of the trains must be examined in terms of patronage and financial results against a background of community interests. Neither financial losses, community needs, nor any other single factor is decisive or controlling; what the Commission must strive for is a weighing or balancing of the needs and interests of the public on the one hand, and, on the other, those of the carrier and interstate commerce. *Denver & R.G.W. R. Co.—Disc. of Pass. Trains*, 360 I.C.C. 216 (1979).

Today, also, there must be considered the effect, if any, of the proposed discontinuance on the human environment and energy conservation, and on mass transit as well. *Harlem Valley Transportation Assn. v. Stafford*, 360 F. Supp. 1057 (1974), and *Chicago S.S. & S.B. Discontinuance of Pass. Serv.*, 354 I.C.C. 306 (1977). In the latter connection it is the Federal policy, as reflected in the amended Urban Mass Transportation Assistance Act of 1964, that financial assistance be made

available for the development of efficient and coordinated mass transportation systems in the solution of urban problems. The Federal government, upon the appropriate application on behalf of an interested State, will provide a high percentage of the cost of new equipment and other capital items, and will make available funds to cover at least a portion of the operating deficit of railroads providing urban mass transportation. There is some significance in whether or not a State shows its concern in this regard, and the importance which a State attaches to a particular passenger train service is demonstrated in the State's activity in applying for available Federal subsidy funds. The instant record gives no indication that any effort whatever has been made by California authorities to obtain Federal subsidy funds for these trains. Nor does this record indicate any adverse effect on the environment from the proposed discontinuance, or increased consumption of energy. To the contrary, the evidence adduced is persuasive that termination of this passenger train service will tend to reduce air pollution and energy consumption.

The effect of the proposed discontinuance on carrier employees has been considered. The evidence fails to establish that there will be adverse effect on such employees. It is well established, in any event, that the Commission is without authority in train discontinuance cases to impose conditions for the protection of carrier employees. *Southern Ry. Co.—Discontinuance of Trains*, 354 I.C.C. 630 (1978).

Considering now the question of whether the continued operation of these trains will constitute an unreasonable burden on SoPac, one fact stands out with utmost clarity—Nobody, no one involved in these proceedings has seriously contended that operation of the trains has been profitable for the railroad. Caltrans insists, however, that in due course SoPac will be compensated for all of its reasonable and provable expenses in the operation of the trains, that SoPac will be made whole and thus that there was no unreasonable burden on the carrier. Caltrans insists, also, that CPUC will not order reinstitution of the service other than on a fully subsidized basis, including an authorized rate of return higher than that which the carrier has experienced for years in its operations. Caltrans insists that the

commuter train operations if reinstituted would, in fact, contribute to the railroad's revenue needs, and that the reinstituted operations thus will not be an unreasonable burden on the carrier. Caltrans insists, finally, that because operation of the trains has been suspended there is presently no unreasonable burden on the carrier. It is the essence of protestant's case that in the existing situation in which the trains are not being operated there can be no unreasonable burden, and that this decision must deal with that existing situation. The existing situation is precisely the situation with which this decision proposes to deal. The Judge finds that the situation that exists is one in which SoPac, a common carrier by railroad authorized to operate and operating in interstate commerce, is being inhibited in the free and unfettered use of its own lines and plant without justification, and in the right, subject only to the requirements of Federal law, to operate its lines and plant in the manner which in the full exercise of its managerial discretion it deems most calculated to yield optimum revenues and to fulfill efficiently and economically its common carrier obligations to the public. The Judge finds that this imposes an unreasonable burden on the carrier, on its operations, and on interstate commerce.

Section 10909 like its predecessor, section 13a, is intended to protect rail carriers and interstate commerce from onerous burdens which impair the ability of such carriers to continue to provide essential transportation services to the public. In making its determinations in proceedings involving the proposed discontinuance of passenger trains the Commission must give effect not only to the specific requirements of section 10909 but also to the rail transportation policy adopted by the congress and enacted in Staggers. That policy requires more than that the Commission cooperate with the States on transportation matters, as Caltrans has suggested. That policy requires that the railroad industry be so regulated as to foster sound economic conditions in transportation, that a safe and efficient rail transportation system be promoted by allowing railroads to earn adequate revenues. These ends are not reached in an atmosphere in which railroads are required to forego potentially profitable freight services in order to preserve

valuable morning and evening time slots preempted for commuter train services which the railroads may be ordered to resume at any time, an atmosphere in which the railroad's tariff is ignored and in which the railroad must hold its line and plant in readiness to comply immediately at any time with an order to resume such operations. The Staggers Act is explicit in its goals, among which are the following: To assist the rail system to remain viable in the private sector of the economy, and to provide a regulatory process that balances the needs of carriers, shippers, and the public. The CFUC orders under which SoPac may at any time be ordered immediately to resume the operations of the Caltrains pose an obstacle or barrier to the achievement of the Staggers goals, and frustrate as well the railroad's efforts to serve the transportation needs of the nation as a whole with maximum efficiency and economy. To this extent, at the very least, there is an unreasonable burden imposed on the carrier, on its operations, and on interstate commerce.

The final question relates to the present and future public convenience and necessity—whether the burden discussed above is outweighed by the needs of the traveling public, the present or potential riders on these trains, so that the door must nevertheless be kept open for the continued operation of the Caltrains. The uncontroverted evidence is that public demand for the operation of these trains has been minimal, and that insofar as revealed in this record the outlook for future ridership on these trains is bleak. There is no probative evidence that the failure of these trains to achieve significant ridership is attributable to any downgrading of its service by the carrier, nor to any failing on the part of the carrier, or of Caltrans for that matter, to promote the commuter service. In the latter regard it is well established that where people must be importuned to use a rail passenger service they really have no need for such service, and it is *need* that is the issue. Compare *Chicago, B. & O. R. Co.—Discontinuance of Trains*, 334 I.C.C. 210 (1969). There is some indication that a factor in the poor ridership on these trains is a lack of a feeder system at the commuter origins, and another is the vast dispersion of business and industry in the Los Angeles area. But it may well be that,

absent these shortcomings, the commuter rail service still could not compete effectively with the seemingly overwhelming preference of Californians for the private automobile—this record does not reveal the answer. What is clear in this proceeding is that the Commission's discretion in this matter is limited to the parameters of section 10909 and the specific facts of record. The public demand for these trains must be considered as it existed and not as it might someday be. See *Boston & Maine Corp. Discontinuance of Trains*, 328 I.C.C. 594 (1967). As stated by the carrier, the demonstrated poor patronage of the trains is a potent indicator of lack of public convenience and necessity, not a mandate for the continued operation of the trains. All evidence of record considered, the Judge finds that (a) the present or future public convenience and necessity permit the discontinuance of these trains as proposed, and (b) the continued operation of these trains will constitute an unreasonable burden on the interstate operations of SoPac or on interstate commerce. The Judge concludes that there is and will be adequate alternative service available to the public, and that the petition to discontinue these trains should be, and it is hereby, granted.

Premises considered, it is the ORDER of the Administrative Law Judge:

1. That this petition for authority to discontinue passenger train service between Oxnard and Los Angeles, serving intermediate points, is granted, and
2. That this order shall become effective thirty (30) days after the date it is served.

By the Commission, Paul J. Clerman, Administrative Law Judge.

JAMES H. BAYNE
Acting Secretary

(SEAL)

APPENDIX

Finance Docket No. 30123

**SOUTHERN PACIFIC TRANSPORTATION COMPANY
CALIFORNIA SPECIAL TRAIN SERVICE TARIFF**

ICC-SP-P-9003

**RATES, CHARGES, RULES AND REGULATIONS
FOR
SPECIAL PASSENGER TRAIN SERVICE
BETWEEN
OXNARD, CA AND LOS ANGELES, CA,
AND
INTERMEDIATE POINTS**

**AUTHORITY TO DEPART FROM THE PROVISIONS OF
49 C.F.R. §1303 TO THE EXTENT NECESSARY; ICC
SPECIAL TARIFF AUTHORITY NUMBER 83-1376**

NOTICE: The provisions published herein will, if effective, not result in an effect on the quality of the human environment.

ISSUED: November 12, 1982 **EFFECTIVE:** December 2, 1982

ISSUED BY:

**K. R. Wyma, Tariff Publishing Officer
Southern Pacific Building
One Market Plaza
San Francisco, CA 94105**

This tariff is filed solely for the purpose of setting forth rates, rules, regulations and charges for special passenger train services operated under protest by Southern Pacific Transportation Company for the State of California, Department of Transportation pursuant to orders of the California Public Utilities Commission Decision 82-10-041 and Decision 82-06-045.

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PARTICIPATING CARRIERS:

Southern Pacific Transportation Company

INDEX OF STATIONS:

Oxnard, Station No. 35410

Los Angeles Union Passenger Terminal, Station No. 40441

EXPLANATION OF REFERENCE MARKS AND ABBREVIATIONS:

SP: Southern Pacific Transportation Company

Carrier: Southern Pacific Transportation Company

TPO: Transportation Project Operator: Agency,
public, or private, requesting the provision of
services described in this tariff.

SECTION I—RULES AND REGULATIONS

RULE 1—Service Provided:

This tariff sets forth the terms, conditions, rules, regulations and charges whereby SP will provide special passenger train services for TPO between Oxnard, Ventura County, CA and Los Angeles, Los Angeles County, CA, via SP's coast main line through Camarillo, Moorpark, Santa Susana, Chatsworth, Glendale, and Burbank, CA.

RULE 2—Passenger Coaches and Locomotives:

SP does not hold itself out to provide, repair, or maintain any passenger coaches or locomotives for this service, except as otherwise provided herein. All passenger coaches, locomotives and other passenger rolling stock shall be furnished by TPO fully fueled and serviced and shall be maintained in safe operating condition by TPO. SP will furnish inspection services as required by regulatory authorities, and such emergency servicing or repairs on line as may be needed to permit the equipment to return to TPO's servicing facilities at Los Angeles.

RULE 3—Safe and Lawful Operating Condition:

All locomotives, passenger coaches and other passenger rolling stock provided by TPO shall be in safe, sound, operating condition, complying with the requirements of all federal and state laws pertaining to safety, condition, and operability. SP may refuse to accept or move any equipment provided by TPO which fails to comply with the requirements of federal or state laws, or which fails to comply with any minimum mechanical specifications established by the Association of American Railroads for passenger equipment offered in interchange service, or which, in the judgment of SP's mechanical officers, represents a hazard to passengers, employees, or other traffic on the railroad. TPO agrees to indemnify SP and save SP harmless against any claims, penalties, or fines levied against SP because of any unsound, unsafe, or unlawful condition in TPO's locomotives and rolling stock while on SP's railroad.

RULE 4—Length and Horsepower Restrictions:

Trains offered by TPO shall not, without SP's prior consent, exceed eight cars, plus the locomotive unit or units. No train shall be offered by TPO powered with less than 6HP per trailing ton.

RULE 5—Termini:

The service offered herein shall extend between Oxnard and Los Angeles Union Passenger Terminal at Los Angeles. The services offered herein do not include any track or usage charge assessed by Los Angeles Union Passenger Terminal for access to that terminal, for use of that terminal, or for any services provided by the terminal for TPO's trains.

RULE 6—Service Frequency:

Two trains in each direction Monday through Friday, except holidays designated by TPO.

**RULE 7—Sale of Tickets by TPO for Use on Trains
Authorized:**

TPO may invite members of the public to use the trains, on such terms, conditions, and limitations as TPO shall elect. SP shall have no responsibility to such members of the public for TPO's undertaking, which shall be strictly between TPO and those invited by TPO.

TPO's invitees, employees, and guests shall be permitted access to SP's property for the purpose of boarding or detraining from trains, subject to the conditions set forth in this tariff.

RULE 8—Passenger Access:

TPO's employees, passengers and guests may not park or leave standing any vehicles upon SP's property, except in specifically allocated areas set aside for the use of TPO under

the provisions of Rule 9. Access and egress and availability of parking at Los Angeles Union Passenger Terminal is not controlled by SP, and shall be as provided by that terminal company.

RULE 9—Intermediate Stations:

SP will make intermediate station stops, as requested by TPO, under the following conditions:

1. The location requested by TPO, including the access facilities reasonably required, does not obstruct nor interfere with SP operations, nor create hazardous or dangerous conditions for SP's employees or users of TPO's trains.

2. Any platforms, walkways, parking lots, shelters, fences, lights or structures desired by TPO for the comfort, convenience, or safety of TPO's employees, guests and passengers shall be constructed at TPO's sole expense in accordance with specifications reviewed and approved by SP, and shall thereafter be maintained by TPO at its sole expense.

3. Removal of facilities and improvements: Upon completion of the services requested by TPO, or if TPO should request no services for a period of three consecutive months, or if TPO should become more than 60 days delinquent in the payment of any charges set forth in Item 10, SP may instruct TPO to remove forthwith the stations, structures, improvements, walkways, parking lots and other facilities constructed for this service. All debris, scrap, concrete and pavement removed shall be the property of TPO and disposal shall be arranged by TPO, and removal of same and restoration of premises shall be to SP's satisfaction.

RULE 10—Services Provided by SP:

SP shall furnish, for the basic charges set forth herein, a qualified train and engine crew to operate TPO's trains on SP's tracks between the termini described herein. The employees

provided by SP shall only be required to operate the trains, and shall also, if requested by TPO, collect tickets issued by TPO and sell cash fares in accordance with a schedule of charges furnished by TPO. As crews for this service are drawn, under SP's labor agreements, from a freight service pool, SP cannot guarantee to provide uniformed crews for the trains, but shall furnish distinctive identification to conductors and fare collectors. TPO may also place on its trains, at TPO's expense, such other personnel as TPO desires to have present.

SP will not provide any station personnel at termini or at intermediate stations, nor will SP undertake any responsibility for printing or distributing timetables showing TPO's services, nor will SP hold itself out to provide telephone information service or other public contact information concerning the services that TPO desires to operate. All such public contacts and station services shall be the sole responsibility of TPO.

In the event any of the services described in this Rule as those which TPO may provide, or other on-train or station services not described but provided by TPO, are held as the result of litigation or compulsory arbitration to be services subject to the jurisdiction of SP's labor contracts, TPO shall thereafter observe the terms and conditions of such contracts with respect to the affected positions. Nothing herein shall require SP to violate the terms and conditions of its labor agreements.

RULE 11—Priorities and Performance:

TPO will have its trains fueled, serviced, and ready to depart punctually at the departure times specified by TPO. SP will operate TPO's trains over SP's line at speeds permitted for Amtrak passenger trains, subject to the limitations, if any, of TPO's locomotives and passenger equipment. SP will use reasonable diligence to accord TPO's trains movement priority over SP's freight services, consistent with good railroad operating practices, but SP shall not be obligated to delay: 1) freight movements required to prevent an industry shutdown; 2) freight movements required to avoid on-line tie-ups under

the Hours of Service Law; 3) work or relief trains engaged in emergency maintenance, or 4) train movements required to clear congestion occurring on the affected line. TPO's trains will not be accorded movement priority over any intercity passenger trains operated by or for Amtrak.

While SP shall use reasonable diligence to provide good performance to TPO's trains, SP assumes no responsibility to TPO, its employees, passengers, or guests, for delays whether caused by traffic congestion or otherwise.

RULE 12—Departure and Operating Times:

Operations shall initially be conducted in accordance with the schedule designated by TPO. If the experience developed during any two months of operations in accordance therewith establishes that the schedule required by TPO detracts from the level and quality of pre-existing rail passenger and/or freight service, TPO shall be requested to promptly deposit with SP a sum equal to the estimated cost of capital improvements necessary to eliminate such interference with the level and quality of pre-existing services. Unless TPO makes the requested deposit of estimated capital construction costs within ten days, or alternatively agrees to modify or reduce its schedules so as to eliminate the conflict with pre-existing rail passenger and/or freight services, SP may suspend this service without further notice. Such suspension of service shall not change or reduce any pre-existing obligation of TPO to pay for services requested.

SECTION II—RATES AND CHARGES

ITEM 10—Basic Compensation:

1. All rates, fares, charges, and compensation to be paid by TPO to SP, stated as of the effective date of this tariff, shall be subject to all quarterly increases approved by the ICC

pursuant to indexing procedures adopted in Ex Parte 290 (Sub-No. 2) *Railroad Cost Recovery Procedures* (49 C.F.R. §1102) and published in the ICC RCCR-series tariffs.

2. The basic service period for calculation of compensation is one month. TPO's initial service request shall obligate TPO to take or pay for not less than one month of service and, unless terminated by TPO, the service shall automatically be renewed from month to month, with SP cumulating charges and billing TPO at the end of each calendar month.

3. The basic compensation charge shall be \$588,200 per month, or a fraction thereof, in the event the service is terminated within thirty days of its inauguration, or within thirty days of any subsequent month of operation. TPO shall pay all charges due within seven days of presentment of SP's bill. In the event any bill calculated under the provisions of this tariff shall remain unpaid thirty-five days after presentation, SP shall be entitled to summarily suspend the service, and shall not resume its operation until TPO has paid all outstanding amounts due under this tariff.

4. No credit shall be allowed for trains not operated because of mechanical failure, cancellation by TPO, or other causes beyond the control of SP.

ITEM 20—Indemnification:

The compensation set forth in Item 10 is predicated upon the assumption, by TPO, of all liability risks set forth in this Item. By requesting service, or continuing to request service, TPO agrees to release, indemnify, defend and hold harmless SP (and its officers and employees) from and against all liability, cost and expense for loss of or damage to any property whatsoever or injury to or death of any person whomsoever (whether an employee, guest or invitee of TPO or SP or a paying passenger, trespasser, third person or otherwise) arising out of the presence or operation of TPO's trains, regardless of whether caused or contributed to by the negligence or alleged negligence, active or passive, of SP.

ITEM 30—Storage of Trains:

Storage of trains, and security, electricity, heat, water, garbage and sewer services during storage or layovers shall be the sole responsibility of TPO, and SP assumes no responsibility for TPO's locomotives and passenger coaches during such periods.

ITEM 40—Breakdowns of TPO's Trains:

In the event of locomotive failure or other mechanical impediment preventing completion of an intended run of one of TPO's trains, SP will arrange to pull the inoperative train to its terminal for repair by TPO. In addition to the compensation to which SP shall be entitled from the scheduled operation, SP shall be entitled to additional compensation for each such event of \$6,105.00.

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

STATE OF TEXAS AND RAILROAD
COMMISSION OF TEXAS, et al

v.

UNITED STATES OF AMERICA
AND INTERSTATE COMMERCE
COMMISSION, et al

**CIVIL ACTION
No. A-80-CA-487**

ORDER

Came on for consideration this date the following motions for judgment on the pleadings, summary judgment, and partial summary judgment filed in this cause.

<u>Title of Motion</u>	<u>Date Filed</u>
Defendants' Motion for Judgment on the Pleadings.....	March 9, 1981
Defendants' Motion for Judgment on the Pleadings.....	March 10, 1981
Motion of Intervenor-Defendant Association of American Railroads for Summary Judgment.....	March 11, 1981
Motion for Summary Judgment of Intervenor-Defendants the Atchison, Topeka and Santa Fe Railway Company, et al.	March 12, 1981
Plaintiffs' Motion for Summary Judgment.....	April 21, 1981
Plaintiff-Intervenor's Motion for Partial Summary Judgment.....	April 21, 1981
Motion for Summary Judgment (State of Florida)	June 4, 1981
Motion for Summary Judgment (Florida Railroads)	July 7, 1981

<u>Title of Motion</u>	<u>Date Filed</u>
Plaintiff-Intervenor's Motion for Partial Summary Judgment.....	November 24, 1981
Defendant-Intervenor Association of American Railroads' Motion to Dismiss or, in the Alternative, for Partial Summary Judgment as to Plaintiff Intervenor Illinois' Third Cause of Action	December 28, 1981

Having carefully considered the grounds for said motions and the parties' responses thereto, together with all of the briefs and documents on file in this cause, and having heard extensive oral arguments on the motions, the Court is of the opinion, for the reasons ably presented in the briefs and arguments of Defendants and Defendants-Intervenors, that Defendants and Defendants-Intervenors are entitled to judgment in their favor as a matter of law, and that those above-cited motions filed by Defendants and Defendants-Intervenors should be granted, and that those above-cited motions filed by Plaintiffs and Plaintiffs-Intervenors should be denied. The Court notes that pursuant to Fed. R. Civ. P. 12(c), it has treated all motions for judgment of the pleadings as motions for summary judgment after notifying the parties and affording them an opportunity to present all material made pertinent to a motion for summary judgment under Rule 56.

It is therefore ORDERED that the following motions are hereby GRANTED:

<u>Title of Motion</u>	<u>Date Filed</u>
Defendants' Motion for Judgment on the Pleadings	March 9, 1981
Defendants' Motion for Judgment on the Pleadings	March 10, 1981
Motion of Intervenor-Defendant Association of American Railroads for Summary Judgment	March 11, 1981
Motion for Summary Judgment of Intervenor-Defendants the Atchison, Topeka and Santa Fe Railway Company, et al.	March 12, 1981

<u>Title of Motion</u>	<u>Date Filed</u>
Motion for Summary Judgment (Florida Railroads)	July 7, 1981
Defendant-Intervenor Association of American Railroads' Motion to Dismiss or, in the Alternative, for Partial Summary Judgment as to Plaintiff Intervenor Illinois' Third Cause of Action	December 28, 1981

It is further ORDERED that the following motions are hereby DENIED:

<u>Title of Motion</u>	<u>Date Filed</u>
Plaintiffs' Motion for Summary Judgment	April 21, 1981
Plaintiff-Intervenor's Motion for Partial Summary Judgment	April 21, 1981
Motion for Summary Judgment (State of Florida)	June 4, 1981
Plaintiff-Intervenor's Motion for Partial Summary Judgment	November 24, 1981

It is further ORDERED that the above-titled and numbered cause is hereby DISMISSED WITH PREJUDICE.

SIGNED AND ENTERED this 3rd day of November, 1982.

JAMES R. NOWLIN
James R. Nowlin
United States District Judge

FILED

Aug 9 4:17 PM '82
WILLIAM L. WHITTAKER
U.S. DIST. COURT
NO. DIST. OF CA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN PACIFIC TRANSPORTATION
COMPANY,

Plaintiff,

vs.

PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA,

Defendant.

No. C-82-3074
MHP

ORDER

Southern Pacific Transportation Company (hereinafter "Southern Pacific") has filed an action seeking an injunction against the Public Utilities Commission of the State of California (hereinafter the "PUC") to prevent it from enforcing PUC Decision No. 82-06-045, issued on June 2, 1982. Southern Pacific has moved for a preliminary injunction, and the PUC has moved to dismiss the complaint (the court understands this to be a motion to dismiss the action with prejudice) on res judicata grounds. The State of California has applied to intervene as a defendant. The court, having considered the memoranda and other papers submitted by the parties, and having heard oral argument on the motions, dismisses the action. It is therefore unnecessary to act on the application for intervention.

The uncontroverted allegations of the complaint are as follows. This controversy began on May 18, 1978, when complaints were filed with the PUC, requesting that it order

Southern Pacific to institute commuter rail service between Oxnard and Los Angeles. Public hearings on the question commenced on July 30, 1979. On June 3, 1980, the PUC issued its first order requiring that Southern Pacific provide the service. Pursuant to a petition by Southern Pacific, the PUC agreed to a rehearing, but only on the issue whether it was operationally feasible to combine commuter service with existing service on that line. On October 30, 1980, Southern Pacific filed with the California Supreme Court a petition for a writ of review of the PUC's decision as to issues that were not to be reheard, pursuant to Cal. Pub. Util. Code § 1756. (On July 16, 1981, Southern Pacific supplemented that petition to include issues that, by then, had been reheard.) The rehearing resulted in two PUC decisions, issued April 7, 1981, essentially reaffirming its earlier decision to require Southern Pacific to institute the service.

Further petitions for rehearing were denied, although Southern Pacific received stays and extensions of time thereafter from the PUC. On December 23, 1981, the California Supreme Court denied without comment Southern Pacific's petition for review. After more extensions of time, the PUC on June 2, 1982 issued Decision No. 82-06-045, requiring that construction of improvements needed to institute the service begin on or before June 15, 1982, and that they be completed on or before October 15, 1982. Southern Pacific then filed this action, alleging that federal law preempts state law and precludes PUC regulation of intrastate commuter service, and that the action of the PUC places an undue burden on interstate commerce.

Southern Pacific contends that because California failed to seek certification by the Interstate Commerce Commission (hereinafter the "ICC") of its standards and procedures for regulation of intrastate rail passenger transportation by January 29, 1981, the PUC lost jurisdiction as a result of preemption by section 214 of the Staggers Rail Act, 49 U.S.C. § 11501. It points to the ICC's decision of April 22, 1981 in *Ex Parte 388*, at p. 7, in which the ICC said that ten states, including California, and the District of Columbia, "have lost all jurisdiction to regulate intrastate rail transportation."

This court does not reach the question whether or when the PUC lost jurisdiction. But it is clear from the undisputed allegations of the complaint that the question of preemption and loss of jurisdiction was available as an issue to be raised by Southern Pacific long before the briefing was completed in the petition to the California Supreme Court. And, in fact, Southern Pacific did argue the question before that court. See Petitioner's Reply to Answers of Respondent and Real Party in Interest, dated Sept. 3, 1981, at pp. 14-20. It also raised the interstate commerce issue in its petition. Supplement to Petition for Writ of Review, dated May 7, 1981. Review by the United States Supreme Court of the state Supreme Court's adverse decision was available to Southern Pacific. 28 U.S.C. §1257.¹

When there has been a final judgment on the merits in a prior state-court action, a federal-law claim between the same parties, seeking similar relief in federal court, is barred by the doctrine of res judicata, if it arises from the same wrong as that on which the judgment was based, and if it could have been raised in the state court action, whether or not it was actually was raised. *Gallagher v. Frye*, 631 F.2d 127 (9th Cir. 1980);

¹ The PUC suggests that Southern Pacific, having been unsuccessful before the PUC, could have chosen to present its claims in federal district court, foregoing review by the California Supreme Court. Whether this is so is unclear. There is authority supporting abstention by the district courts in these circumstances. See *Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341 (1951); *Allegheny Airlines, Inc. v. Pa. Pub. Util. Comm'n*, 465 F.2d 237 (3d Cir. 1972), cert. denied, 410 U.S. 943 (1973); *Cal. v. Oroville-Wyandotte Irrigation Dist.*, 409 F.2d 532 (9th Cir. 1969); *Atlantic Coast Line R.R. v. City of St. Petersburg*, 242 F.2d 613 (5th Cir. 1957). Underlying such abstention by district courts is the doctrine of *Burford v. Sun Oil Co.*, 319 U.S. 315, reh'g denied, 320 U.S. 214 (1943). But it is unclear whether a district court could properly abstain on *Burford* grounds in the circumstances of this case. See *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 820 (9th Cir. 1982).

However, it is unnecessary to decide whether abstention would have prevented Southern Pacific from coming straightaway to federal district court. If so, there is all the more reason why this court should not now reach the merits of the controversy. If not, then Southern Pacific, having chosen its forum, should not now be permitted to utilize this one for the purpose of disturbing the state Supreme Court's judgment on the merits.

It appears from section 214 of the Staggers Rail Act of 1980, 49 U.S.C. § 11501, that Southern Pacific might have brought its preemption claim, and possibly also its interstate commerce claim, before the Interstate Commerce Commission. See *id.*, § 11501(c). Again, this is an issue the court need not and does not reach.

Scoggin v. Schrunk, 522 F.2d 436 (9th Cir. 1975), cert. denied, 423 U.S. 1066 (1976). See also *Grubb v. Public Utilities Commission of Ohio*, 281 U.S. 470 (1930) (all matters that were or could have been raised were concluded, so long as the state supreme court had jurisdiction of the subject matter). A denial by the state Supreme Court, even without written opinion, of a petition for a writ of review of a PUC order constitutes a final adjudication on the merits for res judicata purposes. *Pacific Telephone & Telegraph Co. v. Public Utilities Commission of the State of California*, 600 F.2d 1309 (9th Cir.), cert. denied, 444 U.S. 920 (1979). Southern Pacific, having had its day in court, is barred here.² See *Alabama Public Service Commission v. Southern Railway*, 341 U.S. 341, 349

² In oral argument before this court, Southern Pacific suggested that the combined effect of article III, § 3.5 of the California Constitution and Cal. Pub. Util. Code § 1732 is to withdraw jurisdiction from the California Supreme Court to entertain Southern Pacific's federal-law claims based on preemption and lack of PUC jurisdiction, and on the commerce clause. Article III, § 3.5 provides that administrative agencies have no power to declare a statute unconstitutional or to refuse to enforce it on the ground that it is unconstitutional, absent a determination of its unconstitutionality by an appellate court. It also provides that absent an appellate court determination, an agency may not refuse to enforce a statute on the ground that federal law or federal regulations prohibit its enforcement. Cal. Pub. Util. Code § 1732 requires that a court challenge to a PUC order or decision be only on grounds previously raised in a petition to the PUC for a rehearing. Southern Pacific contends that the PUC could not have entertained the federal questions presented here because of article III, § 3.5, and that the state Supreme Court therefore could not have entertained them because of § 1732. It cites *Southern California Gas Co. v. Pub. Util. Comm'n*, 24 Cal. 3d 653, 156 Cal. Rptr 733, 596 P.2d 1149 (1979), as authority for this novel construction.

But *Southern California Gas* does not mention article III, § 3.5. (It is possible—though the opinion leaves this uncertain—that article III, § 3.5 was enacted only after the petition for rehearing was filed.) There is no authority for the absurd proposition that the California Supreme Court is now, as a side-effect of article III, § 3.5, divested of the power to consider federal constitutional provisions in reviewing PUC orders, or that it is divested of the power to determine whether the PUC has exceeded its jurisdiction. Certainly, Southern Pacific did not seem to feel that it was precluded from raising these issues in its petition to the state Supreme Court. And having done so, it should not now be heard to argue that that court lacked jurisdiction over the subject matter. See Restatement, Second, Judgments § 12, Comment (d). Moreover, it is doubtful that Southern Pacific would even have been precluded by article III, § 3.5 from having the federal questions determined in the PUC proceedings, since it was not, strictly speaking, asking the PUC to declare a statute unconstitutional or unenforceable, but asserting federal defenses, including preemption. There is nothing in § 3.5 that precludes a party from raising defenses that it may then reassert on review.

(1951) (ultimate review of federal questions by United States Supreme Court was an adequate safeguard).

There are certain circumstances in which overriding considerations of public policy require that final state court judgments adjudicating federal questions not be given res judicata effect in a subsequent action in federal court. For example, in *Red Fox v. Red Fox*, 564 F.2d 361 (9th Cir. 1977), the court, while acknowledging that 28 U.S.C. § 1738 ordinarily requires that federal courts respect the res judicata effect of state court judgments on subsequent federal-law claims, recognized that "the implementation of federal statutes representing countervailing and compelling federal policies justifies departures from a strict application of that rule." *Id.* at 365 n.3. It went on to hold that because of the American Indian's "peculiar and protected status" in the eyes of Congress, the Indian Civil Rights Act, 25 U.S.C. §§ 1301 et seq., is one such statute, and therefore a "transparently erroneous" state court determination of a claim cognizable under the Indian Civil Rights Act will not preclude a subsequent federal court action, if preclusion would result in a "miscarriage of justice." *Id.* at 365. See also *Brown v. Felsen*, 442 U.S. 127 (1979) (section 17 of the Bankruptcy Act of 1898, formerly 11 U.S.C. § 35); *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079 (8th Cir.), cert. denied, 446 U.S. 966 (1980) (Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e et seq.), disapproved in *Kremer v. Chemical Construction Corp.*, U.S. , 102 S.Ct. 1883 (1982); *American Mannex Corp. v. Rozands*, 462 F.2d 688 (5th Cir.), cert. denied, 409 U.S. 1040 (1972) (dictum—federal tax statutes); *Mach-Tronics, Inc. v. Zirpoli*, 316 F.2d 820 (9th Cir. 1963) (dictum—Sherman Anti-Trust Act, 15 U.S.C. §§ 1 et seq., Clayton Act, 15 U.S.C. §§ 12 et seq.).

However, "the intention of Congress to make such an exception [to 28 U.S.C. § 1738] should not be readily inferred." Restatement, Second, Judgments § 86, Comment (d). See also *Kremer v. Chemical Construction Corp.*, 012 S.Ct. at 1890. Application of this exception to the traditional res judicata doctrine is "rare," 1B J. Moore & T. Currier, *Moore's Federal Practice* ¶ 0.405[11] at 784, 786 (2d ed. 1982), and

may become even more so after the Supreme Court's sharp disavowal of public policy-based erosions of the *res judicata* principle in *Federated Department Stores v. Moitie*, 452 U.S. 394, 401 (1981). And there has been no showing in this case that any public policy or Congressional purpose requires relitigation by a federal district court of the federal questions.³ Rather, the contrary appears to be true. See *Allegheny Airlines, Inc. v. Pennsylvania Public Utility Commission*, 465 F.2d 237 (3d Cir. 1972), *cert. denied*, 410 U.S. 943 (1973); *State of California v. Oroville-Wyandotte Irrigation District*, 409 F.2d 532 (9th Cir. 1969); *Atlantic Coast Line Railroad v. City of St. Petersburg*, 242 F.2d 613 (5th Cir. 1957).

To permit such relitigation after a full opportunity was afforded Southern Pacific to present these issues to the California and United States Supreme Courts would risk encouraging dilatory tactics by unhappy litigants.

³ As Southern Pacific conceded in oral argument, section 214 of the Staggers Rail Act of 1980, 49 U.S.C. § 11501, permits state authorities to exercise regulatory jurisdiction over intrastate rail transportation, so long as they receive from the Interstate Commerce Commission certification of their standards and procedures. Therefore, it cannot be maintained that actions challenging the acts of these state authorities arise in an area of such inherent and exclusive federal concern that relitigation is warranted.

Of course, if the federal question brought before a federal court is one of which federal courts have exclusive jurisdiction, the plaintiff cannot be barred by *res judicata* as a consequence of a prior state court judgment. This is the import of some of the cases cited by Southern Pacific in its Reply Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction: *Kalb v. Feuerstein*, 308 U.S. 433 (1940) (Bankruptcy Act); *United States v. Ohio*, 487 F.2d 936, 943 (T.E.C.A. 1973), *aff'd sub nom. Fry v. United States*, 421 U.S. 542 (1975) (Economic Stabilization Act of 1970).

But because the California Supreme Court had jurisdiction to decide the federal questions in this case, see note 2, *supra*, these cases are inapposite. Other cases cited by Southern Pacific in its Reply Memorandum are inapposite for other reasons—e.g., because the federal statute involved called for some sort of federal review after review by the state authority (*North Carolina v. United States*, 210 F.Supp. 673, 679 (D.N.C. 1962), *rev'd on other grounds*, 376 U.S. 93 (1964)), or because the decision that was not given preclusive effect was a decision by a state administrative body that lacked jurisdiction over the subject matter (*Lightsey v. Harding, Dahm & Co.*, 623 F.2d 1219 (7th Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981); *Pennsylvania R.R. v. Sharfsin*, 369 F.2d 276 (3d Cir. 1966), *cert. denied*, 386 U.S. 982 (1967)).

For the foregoing reasons, the PUC's motion to dismiss under Fed. R. Civ. P. 12(b) will be deemed a motion for summary judgment under Fed. R. Civ. P. 56, and as such it is granted.

MARILYN HALL PATEL

Marilyn Hall Patel
United States District Judge

9 August 1982.

ORIGINAL
FILED
11 AUG 1982
CLERK, U.S. DIST.
COURT
SAN FRANCISCO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN PACIFIC TRANSPORTATION
COMPANY,
Plaintiff,

vs.

PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
Defendant.

THE STATE OF CALIFORNIA, ACTING BY
AND THROUGH THE DEPARTMENT OF
TRANSPORTATION,
Intervenor.

No. C-82-3074
MHP
AMENDMENT
TO ORDER
FILED
AUGUST 9, 1982

The order of this court filed August 9, 1982 is amended as follows.

At page 1, lines 19-24 delete "The State of California has applied to intervene as a defendant. The court, having considered the memoranda and other papers submitted by the parties, and having heard oral argument on the motions, dismisses the action. It is therefore unnecessary to act on the application for intervention." Replace the deleted sentences by "The State of California has applied to intervene as a defendant, and this application, being unopposed, is granted. The

court, having considered the memoranda and other papers submitted by the parties, and having heard oral argument on the motions, dismisses the action."

MARILYN HALL PATEL

**Marilyn Hall Patel
United States District Judge**

11 August 1982.

Original
FILED

Nov. 3, 1982
Clerk, U.S. Dist. Court
San Francisco

FILED
Nov. 3 5:12 PM '82
William L. Whittaker
Clerk
U.S. District Court
No. Dist. of CA

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

SOUTHERN PACIFIC TRANSPORTATION
COMPANY,

Plaintiff,

vs.

PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA,

Defendant.

STATE OF CALIFORNIA, ACTING BY
AND THROUGH THE DEPARTMENT OF
TRANSPORTATION,

Intervenor-Defendant.

**No. C-82-3074
MHP
ORDER**

**ENTERED
IN CIVIL
DOCKET
NOV. 4, 1982**

The Southern Pacific Transportation Company's motion for injunctive relief pending appeal came on this day pursuant to this Court's order shortening time of October 20, 1982. Malcolm T. Dugan appeared for plaintiff. Vincent MacKenzie appeared for defendant California Public Utilities Commission. O. J. Solander appeared for intervenor-defendant State of California, Department of Transportation.

Oral argument having been heard and the Court having reviewed all documents presented by the parties, and being advised in the premises, finds that

1. The status quo has changed substantially since SP filed its notice of appeal on August 19, 1982, e.g., the rail service has

commenced on October 18, 1982, several station facilities have been constructed and substantial expenditure of State funds has occurred, litigation has been commenced and conducted and is now pending in the State Court. Plaintiff's motion, therefore, does not fall within the contemplation of Fed.R.Civ.P. 62(c). *McClatchy Newspapers v. Central Valley Typo, etc.* (9th Cir. 1982) 686 F.2d 731, 735. The relief sought by this motion is not to maintain the status quo at the time of appeal, but is in the nature of a new action for injunctive relief.

The Court further finds:

a. Plaintiff is not likely to prevail on the merits of its appeal. Plaintiff failed to cite any new authority, state any new facts or make any arguments that persuade this Court to change its previous decision, as set forth in its August 9, 1982 order.

b. Plaintiff has not shown that the public interest favors the granting of the injunctive relief sought. Indeed, the opposing party to this action, the Public Utilities Commission of the State of California, created by the California Constitution, art. 12, is mandated to protect the public interest and deference should be given to its decision as being in the interest of the public.

c. The public interest, which has been determined by the State of California, supports continuation of the passenger rail service that began October 18, 1982.

For the foregoing reasons, plaintiff's motion for injunction pending appeal is denied.

Dated: November 3, 1982

MARILYN HALL PATEL

Marilyn Hall Patel
United States District Judge

FILED

September 27, 1983

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF
APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC
TRANSPORTATION CO.,
Plaintiff-Appellant,
vs.

PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA,
Defendant-Appellee,

STATE OF CALIFORNIA DEPARTMENT
OF TRANSPORTATION,
Intervenor-Defendant-Appellee.

No. 82-4466

(D.C. No.
C-82-3074-MHP)
OPINION

**Appeal from the United States District Court
for the Northern District of California
Honorable Marilyn Hall Patel, District Judge, Presiding
Argued and Submitted—April 11, 1983**

Before: DUNIWAY, SNEED AND FARRIS,
Circuit Judges
DUNIWAY, Circuit Judge:

Southern Pacific Transportation Co. appeals from the district court's judgment dismissing Southern Pacific's action seeking an injunction against enforcement of an order by the California Public Utilities Commission requiring Southern Pacific to run certain commuter trains within the state. The district court held that res judicata prevents consideration of Southern Pacific's argument that the Commission order is illegal because the order is preempted by federal law.

I. Facts.

This dispute arises from orders of the California Commission requiring Southern Pacific to run weekday commuter trains over its line between Oxnard and Los Angeles.

The Commission issued its first order on June 3, 1980. It required Southern Pacific to build several station platforms and parking lots and to run two trains each way every weekday. Equipment was to be provided by the county of Los Angeles and the state Department of Transportation (Caltrans), which had requested the commuter service. That order was stayed, however, and on September 23, 1980, the Commission issued another decision modifying the first order. The railroad petitioned for rehearing of the September order, and then on October 3, 1980 filed in the supreme court of California a petition for writ of review. That petition was docketed as No. S.F. 24220. It sought review of so much of the June order as was reaffirmed in the September order.

Early in 1981, the county of Los Angeles moved to withdraw as a complainant. On April 7, 1981, the Commission granted the county's motion. In two orders issued on that day, it also denied a motion by Southern Pacific to dismiss, and ordered the commuter service to begin. In response, Southern Pacific filed, on May 7, 1981, petitions for rehearing of the two April orders. The Commission stayed the portions of the orders demanding immediate construction of stations and parking lots, but on June 16, 1981, denied rehearing. Southern Pacific then, on July 16, 1981, filed in the state supreme court a second petition for a writ of review, this one referring to the Commission's April 7 and June 16 orders. The petition was docketed as S.F. No. 24316. On December 23, 1981, the state supreme court denied the two petitions for review without hearing or opinion. Southern Pacific did not seek review of the state supreme court's decision in the United States Supreme Court.

The Commission lifted the stay of its last order on June 2, 1982 and directed that the railroad begin construction of the station platforms and parking lots. In response, Southern Pacific filed in federal district court its complaint seeking

declaratory and injunctive relief against enforcement of the Commission's order. Its complaint named the Commission as the only defendant, but the district court later granted Caltrans' motion to intervene as a defendant.

Southern Pacific argued, *inter alia*, that the Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895, section 214(a) of which amended 49 U.S.C. §11501, preempted the Commission's jurisdiction over commuter service. The Staggers Act was enacted on October 14, 1980, during the early stages of the proceedings before the state Commission. It required that a state "authority" seeking to exercise "jurisdiction over intrastate rates, classifications, rules and practices" must apply, within 120 days, for certification to the Interstate Commerce Commission (ICC). 49 U.S.C. § 11501(b)(2). If, after applying certain standards, the ICC refused to certify a state authority, or if the authority did not apply for certification, the authority was forbidden to "exercise any jurisdiction over intrastate rates, classifications, rules and practices" *Id.*, 11501(b)(4)(A).

California did not seek certification within the deadline under § 11501, and, on April 17, 1981, the ICC issued a decision stating, "States . . . that did not seek certification have lost all jurisdiction to regulate intrastate rail transportation." *Ex Parte* No. 388, 364 I.C.C. 881, 46 Fed. Reg. 23335, 23337 (April 24, 1981). In another order, issued May 4, 1982, the ICC explained that California had since asked it to assume jurisdiction. It stated, "Consequently, the [Interstate Commerce] Commission shall assume jurisdiction over intrastate rail transportation in [California] upon publication of this notice in the Federal Register." *Ex Parte* No. 388, 365 I.C.C. 700, 47 Fed. Reg. 20220 (May 11, 1982).

Southern Pacific argued before the district court that because the Staggers Act preempted all state jurisdiction over all intrastate rail service in California, the Commission's orders were invalid. The Commission argued in response that the Staggers Act preempted state authority only over intrastate freight service, not passenger service. The district court did not reach the merits. It held instead that the California supreme court's denial of the petitions for review was *res judicata* as to

the preemption issue. Summary judgment was entered against Southern Pacific.

II. Our Jurisdiction.

We first consider whether Southern Pacific's action to enjoin enforcement of the Commission's order is a case "arising under" the federal Constitution or laws and thus is within the jurisdiction of the federal courts. 28 U.S.C. § 1331. This issue was not raised in the district court, and the parties argued it here only upon our instructions.

Southern Pacific's action to enjoin enforcement of the California Commission's order is based on its claim that federal law preempts the Commission's jurisdiction over passenger rail service. Thus, Southern Pacific sought to use preemption, which might have been its defense to a state court action to enforce the Commission's order, offensively in federal court to enjoin enforcement. Our order to the parties asked them to brief the issue of whether there is federal jurisdiction of such an action, citing *Miller-Wohl Co. v. Commissioner of Labor & Industry*, 9 Cir., 1982, 685 F.2d 1088.

Miller-Wohl was an action in federal district court by an employer seeking a declaratory judgment that federal law preempted a state law that the employer was accused of violating. We held that there was no federal jurisdiction of the employer's action because its claim was essentially a defense to the state court action. 685 F.2d at 1090-1091. Accord *Armstrong v. Armstrong*, 9 Cir., 1983, 696 F.2d 1237.

The plaintiffs in *Miller-Wohl* and *Armstrong* sought only declaratory judgments that federal law preempted the relevant state law. A decision by the Supreme Court since the date of oral argument in this case makes clear, however, that when a plaintiff seeks to enjoin state action because federal law preempts it, jurisdiction is proper. *Shaw v. Delta Air Lines, Inc.*, 1983, ____ U.S. ____, fn. 14 at ____ (June 24, 1983, slip op. at 9-10, n.14); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 1983, ____ U.S. ____, ____-____, n.20 (June 24, 1983, slip op. at 18-19 & n.20).

In *Shaw*, plaintiffs filed actions for injunctive and declaratory relief in district court, alleging that the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, preempted certain state civil rights and disability payments statutes. In footnote 14, *id.* (slip op. at 9-10) the Court held that federal jurisdiction existed:

It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. See *Ex parte Young*, 209 U.S. 123, 160-162 (1908). A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve. (citations omitted.)

See, to the same effect, *Construction Laborers Vacation Trust, supra*, ____ U.S. at ____ n.20 (slip op. at 18 n.20).

Because Southern Pacific's complaint sought to enjoin enforcement of an order it claimed to be preempted by federal law, the case "arose under" federal law: 28 U.S.C. § 1331. See *Conference of Federal Savings & Loan Ass'ns v. Stein*, 9 Cir., 1979, 604 F.2d 1256, 1259, *aff'd mem.*, 1980, 445 U.S. 921 (cross claim for injunction); *Rath Packing Co. v. Becker*, 9 Cir., 1975, 530 F.2d 1295, 1303-1306, *aff'd sub nom. Jones v. Rath Packing Co.*, 1977, 430 U.S. 519. *United Air Lines, Inc. v. Division of Industrial Safety of the Department of Industrial Relations*, 9 Cir., 1980, 633 F.2d 814, appears to be the contrary, but its holding on this issue, *id.* at 816-817, is disapproved by the rule recited in *Shaw*. See Justice White's dissent to the denial of certiorari, 1981, 454 U.S. 944, 946-950.

III. Res Judicata.

The California supreme court denied writs of review of decisions of the California Commission. That is a denial on the merits and is to be given res judicata effect in federal courts. *The Pacific Telephone & Telegraph Co. v. Public Utilities Commission*, 9 Cir., 1979, 600 F.2d 1309, 1311-1312; see 28

U.S.C. § 1738. "Under res judicata, a final judgment on the merits of an action precludes the parties . . . from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 1980, 449 U.S. 90, 94.

Southern Pacific does not dispute these general propositions, but argues that they do not apply here. Its principal argument, which it repeats in various forms, is that because the Staggers Act preempts state regulatory jurisdiction over intrastate railway service, it forbids any state court from ruling to the contrary. Southern Pacific misses the mark in two directions. First, it presumes its own interpretation of the Act—that the Act does indeed preempt state regulatory jurisdiction over all intrastate rail service. That, of course, is contrary to the state court decision to which we are considering giving res judicata effect. If res judicata applies, a fortiori, it defeats Southern Pacific's premise. Second, the railroad confuses a state's regulatory authority under the Act with a state court's authority to interpret the Act.

The Supreme Court in *Grubb v. Public Utilities Commission of Ohio*, 1930, 281 U.S. 470, made it clear that, where res judicata applies, a federal court must respect a state court's interpretation of federal law. In that case, a bus operator sued in federal court to enjoin a state utilities commission order. The federal court dismissed the action, holding it barred by the res judicata accorded a state supreme court decision issued while the federal suit was pending. The issue in both suits was whether the state commission's order violated the Commerce Clause. The bus operator argued that res judicata did not apply because the state court lacked subject matter jurisdiction. The Court stated:

The [bus operator] relies on the commerce clause of the Constitution as in some way operating to commit to the federal courts and to withhold from the state courts jurisdiction of all suits relating to the regulation or attempted regulation of interstate commerce. This view of that clause is quite inadmissible. It has no support in any quarter, is at variance with the actual practice in this class of litigation, . . . and is in conflict with the doctrine often sustained by this Court that the state and federal courts

have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States, save in exceptional instances where the jurisdiction has been restricted by Congress to the federal courts.

281 U.S. at 475-476 (citations omitted).

We applied the principle of *Grubb* in *Board of Trustees of Carpenters Pension Trust Fund for Northern California v. Reyes*, 9 Cir., 1982, 688 F.2d 671, to give res judicata effect to a California state court ruling on a preemption issue, and see no reason why we should not do the same here.

Nevertheless, Southern Pacific contends that *Grubb* does not require res judicata treatment of a California court's interpretation of the Staggers Act because the Interstate Commerce Commission has exclusive "subject matter" jurisdiction under the Act. It relies on the decision of a three-judge district court in *Pennsylvania Railroad Co. v. Sharfsin*, M.D. Pa., 240 F. Supp. 233, *vacated sub nom. Pennsylvania Public Utilities Commission v. Pennsylvania Railroad Co.*, 1965, 382 U.S. 281. The Supreme Court vacated the decision because a three-judge court was not required. Thus the decision of the three-judge court is a nullity.

Southern Pacific points to nothing in the Staggers Act giving federal courts exclusive subject matter jurisdiction over cases arising under the Act. For that reason, *Kalb v. Feuerstein*, 1940, 308 U.S. 433, and *Consolidated Rail Corporation v. Illinois*, Regional Rail Reorg. Ct., 1976, 423 F. Supp. 941, do not control. Absent such a grant of exclusive judicial subject matter jurisdiction, the Act is subject to state court interpretation. The case of *Chicago v. Atchison, Topeka & Santa Fe Ry. Co.*, 1958, 357 U.S. 77, is not in point for several reasons, the most readily apparent being that no state court there had interpreted the state's regulatory jurisdiction under a federal statute.

Southern Pacific further argues that a state administrative agency's decision should not be given preclusive effect when the agency lacks jurisdiction over the subject matter of the decision. However, it is not the *State Commission's* decision to which the

district court gave res judicata effect, it was the decision of the *California supreme court*. For that reason, *Lightsey v. Harding, Dahm & Co.*, 7 Cir., 1980, 623 F. 2d 1219, is not persuasive.

The railroad argues that res judicata cannot permit a state to violate the Supremacy Clause, any more than a common law doctrine or state statute can. Federal courts, however, are required by federal law to apply res judicata to state court decisions. 28 U.S.C. § 1738; see *Allen, supra*, 499 U.S. at 96. Moreover, the cases upon which Southern Pacific relies, *Chicago & N. W. Transportation Co. v. Kalo Brick & Tile Co.*, 1981, 450 U.S. 311, and *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 1907, 204 U.S. 426, are not in point because they concern state court claims for relief that were appealed to the Supreme Court and held by it to be preempted. These cases might have helped Southern Pacific in a direct appeal or petition to the Supreme Court of the decisions of the California supreme court. They go to the merits of the railroad's preemption claim, a subject we do not reach here.

Southern Pacific argues in its reply brief for the first time on appeal that the state supreme court's denial of its petitions for review of the Commission's orders should not be given res judicata effect because the denial was not on the merits, but "purely procedural." It contends that state law required the California court to deny the petitions because (1) the Commission proceedings appealed from were not final, and (2) the Staggers Act preemption issue was not raised, and could not have been raised, before the Commission; therefore, the state court was not permitted to rule on it.

We need not consider the first argument because it was not raised below. See *Hamilton v. Firestone Tire & Rubber Co.*, 9 Cir., 1982, 679 F.2d 143, 146.

The second argument is that because Art. III, § 3.5 of the California constitution prohibits the Commission from entertaining the preemption issue, under Cal. Pub. Util. Code § 1732, the state supreme court could not have entertained the issue either.

Art. III, § 3.5 states that an administrative agency has no power:

(a) To declare a statute unenforceable, or to refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

Cal. Pub. Util. Code § 1732 limits judicial review of Commission proceedings by providing:

The application [to the Commission] for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in the application.

Thus, Southern Pacific contends that § 3.5 prohibited the Commission from considering the preemption question, that therefore the issue could not have been raised in an application for rehearing under § 1732, and that therefore the California supreme court could not have considered it on review.

Section 3.5 did not prohibit Southern Pacific from stating its preemption claim to the Commission, however. It forbids the Commission from declaring any state statute unconstitutional or unenforceable, but it does not prohibit a party before the Commission from stating an issue in order to preserve it for review by the California supreme court. Moreover, Southern Pacific has pointed to no statute that the Commission would be striking down by recognizing any purported preemption of state authority by the Staggers Act.

Southern Pacific argues further that it could not have raised the Staggers Act issue before the Commission because,

under the Act, the state was not divested of railroad authority until after the Commission's orders were issued. But Southern Pacific could have raised, and apparently did raise, the preemption issue in its motion for rehearing of the Commission's orders of April 7, 1981. The ICC stated on April 17, 1981, that California was without jurisdiction under the Staggers Act. *Ex Parte* No. 388, 364 I.C.C. 881, 46 Fed. Reg. 23335. Southern Pacific's petition for rehearing of the Commission's orders was not filed until May 7, 1981, and the railroad admits that that petition "referr[ed] in the process to the Staggers Act." Opening brief at 12.

Finally, Southern Pacific suggests that even if *res judicata* would otherwise be proper, this court should decline to apply it here for reasons of equity. But the only equitable concern the railroad puts forth is its contention, made repeatedly above, that the Staggers Act preempts state regulation of intra-state railroad service. As we have already explained, we cannot accept that premise, in view of the state supreme court's decision to the contrary which Southern Pacific did not take to the Supreme Court of the United States.

Affirmed.

IV.

We feel compelled to note what appears to us to be a dereliction of duty to the court on the part of Southern Pacific's counsel. On its face, this court's decision in *United Airlines, Inc. v. Division of Industrial Safety, supra*, is contrary to Southern Pacific's contention that the district court had "arising under" jurisdiction, 28 U.S.C. § 1331. However, counsel did not mention it in their briefs. This, we suggest, is a breach of the duty imposed by counsel in the Code of Professional Responsibility DR 7-106(B)(1):

In presenting a matter to a tribunal, a lawyer shall disclose . . . legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.

We note that the law firm that represents Southern Pacific here also represented United Airlines in that case.

We are equally puzzled that counsel for the California Commission and Caltrans did not cite *United Airlines*, but we

know of no rule of professional responsibility that requires a lawyer to cite to the court every case that supports the lawyer's position. We shudder to think what problems such a rule would create, in light of the enormous increase in reported decisions of this and other courts in recent years.

Southern Pacific Transportation Co. v. Public Utilities Commission Of the State of California, et al.—No. 82-4466

SNEED, Circuit Judge, Concurring:

In a very real sense this case reveals a series of missed opportunities on the part of appellant to have its preemption claims heard and decided. As it turns out, the appellant could have brought its suit to obtain an injunction in federal court following the enactment of the Staggers Act and prior to the California Supreme Court's denial of appellant's petition for review. Perhaps, but by no means certainly, it could have brought suit in federal court seeking only a declaratory judgment at that time also. At the time any decision to initiate such suit would have had to have been made, however, *United Air Lines, Inc. v. Division of Industrial Safety of the Department of Industrial Relations*, 633 F.2d 814 (9th Cir. 1980), presented a formidable obstacle to such a course of action. Justice White's dissent to the Supreme Court's failure to grant *United's* petition for certiorari made plain that the Court clearly understood the scope of this court's holding. The footnotes in *Franchise Tax Board v. Construction Laborers Vacation Trust*, U.S. (1983), and *Shaw v. Delat Air Lines, Incl.*, U.S. (1983), now make clear that Justice White's views have prevailed and that *United Air Lines* no longer properly represents the law. The appellant, of course, must suffer for failing to urge at an earlier point in time that *United Air Lines* be overturned.

The missed opportunity that proves fatal, however, is the failure to present vigorously the preemption argument before the California Supreme Court and the failure to seek review by the Supreme Court of the United States. Having chosen to eschew recourse to the federal courts prior to termination of the state proceedings, although perhaps on the basis of a misapprehension of the law, the appellant must be subjected to the consequences of res judicata.

**IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA**

**SOUTHERN PACIFIC TRANSPORTATION
COMPANY, Etc.,**

Petitioner,

v.

S.F. No. 24525

**PUBLIC UTILITIES COMMISSION, Etc.,
et al.,**

Respondents;

**DEPARTMENT OF TRANSPORTATION,
Etc.,**

Real Party in Interest

**NOTICE OF APPEAL TO THE SUPREME COURT OF
THE UNITED STATES**

Notice is hereby given that Southern Pacific Transportation Company, the petitioner above named, hereby appeals to the Supreme Court of the United States from the final order of this Court denying the petition for writ of review, entered herein on August 18, 1983.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

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**IN THE SUPREME COURT
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STATE OF CALIFORNIA**

**SOUTHERN PACIFIC TRANSPORTATION
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Petitioner,

v.

**PUBLIC UTILITIES COMMISSION,
ETC., et al.,**

Respondents;

S.F. No. 24573

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This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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§ 10101a. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation. Added Pub.L. 96-448, Title I, § 101(a), Oct. 14, 1980, 84 Stat. 1897.

§ 10102. Definitions

In this subtitle—

(21) “rate” means a rate, fare, or charge for transportation.

(25) “transportation” includes—

(A) a locomotive, car, vehicle, motor vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1338; Pub.L. 96-296, § 10(a)(1), July 1, 1980, 94 Stat. 799; Pub.L. 96-454, § 3(a), Oct. 15, 1980, 94 Stat. 2011; Pub.L. 97-261, § 6(d)(1), Sept. 20, 1982, 96 Stat. 1107.

§ 10501. General jurisdiction

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation—

(1) by rail carrier, express carrier, sleeping car carrier, water common carrier, and pipeline carrier that is—

(A) only by railroad;

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment; or

(C) by pipeline or by pipeline and railroad or water when transporting a commodity other than water, gas, or oil; and

(2) to the extent such jurisdiction is not limited by subsection (b) of this section or the extent the transportation is in the United States and is between a place in—

(A) a State and a place in another State;

(B) the District of Columbia and another place in the District of Columbia;

(C) a State and a place in a territory or possession of the United States;

(D) a territory or possession of the United States and a place in another such territory or possession;

(E) a territory or possession of the United States and another place in the same territory or possession;

(F) the United States and another place in the United States through a foreign country; or

(G) the United States and a place in a foreign country.

(b) The Commission does not have jurisdiction under subsection (a) of this section over—

(1) the transportation of passengers or property, or the receipt, delivery, storage, or handling of property, entirely in a State (other than the District of Columbia)

and not transported between a place in the United States and a place in a foreign country except as otherwise provided in this subtitle; or

(2) transportation by a water common carrier when that transportation would be subject to this subchapter only because the water common carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, a switching, terminal, lighterage, car rental, trackage, handling, or other charge by a rail carrier for services in the switching, drayage, lighterage, or corporate limits of a port terminal or district.

(c) This subtitle does not affect the power of a State, in exercising its police power, to require reasonable intrastate transportation by carriers providing transportation subject to the jurisdiction of the Commission under this subchapter unless (1) the transportation is deemed to be subject to the jurisdiction of the Commission pursuant to section 11501(b)(4)(B) of this title, or (2) the State requirement is inconsistent with an order of the Commission issued under this subtitle or is prohibited under this subtitle.

(d) The jurisdiction of the Commission and of State authorities (to the extent such authorities are authorized to administer the standards and procedures of this title pursuant to this section and section 11501(b) of this title) over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive.

Pub.L. 95—473, Oct. 17, 1978, 92 Stat. 1359; Pub.L. 96—448, Title II, § 214(c)(3)—(5), Oct. 14, 1980, 94 Stat. 1915.

§ 11501. Interstate Commerce Commission authority over intrastate transportation

(a) The Interstate Commerce Commission shall prescribe the rate, classification, rule, or practice for transportation or service provided by a carrier subject to the jurisdiction of the Commission under subchapter IV of chapter 105 of this title when the Commission finds that a rate, classification, rule, or practice of a State causes—

(1) between persons or localities in intrastate commerce and in interstate and foreign commerce, unreasonable discrimination against those persons or localities in interstate or foreign commerce; or

(2) unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce.

(b)(1) A State authority may only exercise jurisdiction over intrastate transportation provided by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title if such State authority exercises such jurisdiction exclusively in accordance with the provisions of this subtitle.

(2) Within 120 days after the effective date of the Staggers Rail Act of 1980, each State authority exercising jurisdiction over intrastate rates, classifications, rules, and practices for intrastate transportation described in paragraph (1) of this subsection shall submit to the Commission the standards and procedures (including timing requirements) used by such State authority in exercising such jurisdiction.

(3)(A) Within 90 days after receipt of the intrastate regulatory rate standards and procedures of a State authority under paragraph (2) of this subsection, the Commission shall certify such State authority for purposes of this subsection if the Commission determines that such standards and procedures are in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission under this title. If the Commission determines that such standards and procedures are not in such accordance, it shall deny certification to such State authority, and such State authority may resubmit new standards and procedures to the Commission for review in accordance with this subsection.

(B) The standards and procedures existing in each State on the effective date of the Staggers Rail Act of 1980 for the exercise of jurisdiction over intrastate rail rates, classifications, rules, and practices shall be deemed to be certified by the Commission from that date until the date an initial determination is made by the Commission under subparagraph (A) of this paragraph.

(4)(A) Any State authority which is certified by the Commission under this subsection may use its standards and procedures in exercising jurisdiction over intrastate rail rates, classifications, rules, and practices during the 5-year period commencing on the date of such certification. Any State authority which is denied certification or which does not seek certification may not exercise any jurisdiction over intrastate rates, classifications, rules, and practices until it receives certification under this subsection.

(B) Any intrastate transportation provided by a rail carrier in a State which may not exercise jurisdiction over an intrastate rate, classification, rule, or practice of that carrier due to a denial of certification under this subsection shall be deemed to be transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(5)(A) Certification of a State authority under this subsection is valid for the 5-year period beginning on the date of such certification. Prior to the expiration of such 5-year period, the State authority shall resubmit its intrastate regulatory standards procedures to the Commission for subsequent certification in accordance with this subsection.

(B) During any 5-year certification period, a State may not change its certified standards and procedures without notifying and receiving express approval from the Commission.

(6) Notwithstanding any other provision of this subtitle, a State authority may not exercise any jurisdiction over general rate increases under section 10706 of this title, inflation-based rate increases under section 10712 of this title, or fuel adjustment surcharges approved by the Commission.

(c) Any rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title may petition the Commission to review the decision of any State authority, in any administrative proceeding in which the lawfulness of an intrastate rate, classification, rule, or practice is determined, on the grounds that the standards and procedures applied by the State were not in accordance with the provisions of this subtitle. The Commission shall take final action on any such petition within 30 days after the

date it is received. If the Commission determines that the standards and procedures were not in accordance with the provisions of this subtitle, its order shall determine and authorize the carrier to establish the appropriate rate, classification, rule, or practice.

(d)(1) The Commission has exclusive authority to prescribe an intrastate rate for transportation provided by a rail carrier subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title when—

(A) a rail carrier files with an appropriate State authority a change in an intrastate rate, or a change in classification, rule, or practice that has the effect of changing an intrastate rate, that adjusts the rate to the rate charged on similar traffic moving in interstate or foreign commerce; and

(B) the State authority does not act finally on the change by the 120th day after it was filed.

(2) When a rail carrier files an application with the Commission under this subsection, the Commission shall prescribe the intrastate rate under the standards of subsection (a) of this section and chapter 107 of this title. Notice of the application shall be served on the State authority.

(e)(1) The Commission shall prescribe any rate, rule, or practice applicable to transportation provided entirely in one State by a motor common carrier of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title—

(A) if the carrier has requested the department, agency, or instrumentality of such State having jurisdiction over such rate, rule, or practice for permission to establish such rate, rule, or practice and the request has been denied (in whole or in part) or the State authority has not acted finally (in whole or in part) on the request by the 120th day after the carrier made the request; and

(B) if the Commission finds that the rate, rule, or practice in effect and applicable to such intrastate transportation causes unreasonable discrimination against or

imposes an unreasonable burden on interstate or foreign commerce.

(2) For purposes of paragraph (1)(B) of this subsection, there shall be a rebuttable presumption that—

(A) any rate, rule, or practice applicable to transportation provided by a motor common carrier of passengers entirely in one State imposes an unreasonable burden on interstate commerce if the Commission finds—

(i) that such rate, rule, or practice results in the carrier charging a rate for such transportation which is lower than the rate such carrier charges for comparable interstate transportation of passengers;

(ii) on the basis of evidence presented by the carrier, that as a result of such rate, rule, or practice such carrier does not receive revenues from such transportation which exceed the variable costs of providing such transportation; or

(iii) that the department, agency, or instrumentality of such State having jurisdiction over such rate, rule, or practice failed to act finally (in whole or in part) on the request of the carrier to establish such rate, rule, or practice by the 120th day after the date the carrier made the request; and

(B) any rate applicable to transportation entirely in one State imposes an unreasonable burden on interstate commerce if the Commission finds that the most recent general rate increase applicable to transportation provided by motor common carriers of passengers in such State is less than the most recent general rate increase applicable to interstate transportation provided by motor common carriers of passengers under this subtitle.

(3)(A) A motor common carrier of passengers must file an application with the Commission for prescription under this subsection of a rate, rule, or practice applicable to transportation provided entirely in one State by such carrier. When such application is filed with the Commission, the carrier shall certify that he has notified (i) the Governor of such State, (ii) the department, agency, or instrumentality of such State which

denied, or failed to take action on, the request of such carrier related to such rate, rule, or practice, and (iii) such other interested persons as the Commission may specify by regulation. The Commission shall take final action on any such application not later than 90 days after such application is filed with the Commission.

(B) The Commission shall establish, by regulation, procedures for processing applications under this subsection.

(4) This subsection shall not apply to any carrier owned or controlled by a State or local government.

(5) No State or political subdivision thereof and no interstate agency of other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provisions having the force and effect of law relating to scheduling of interstate or intrastate transportation provided by motor common carrier of passengers subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title on an authorized interstate route or relating to the implementation of any reduction in the rates for such transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required. This paragraph shall not apply to intrastate commuter bus operations.

(6)(A) No motor common carrier of passengers providing transportation subject to the jurisdiction of the Commission may charge or collect a rate for intrastate service provided on an authorized interstate route which constitutes a predatory practice in contravention of the transportation policy set forth in section 10101(a) of this title.

(B) When the Commission decides, upon complaint by any person, that a reduction in a rate charged or collected by such a motor common carrier of passengers for intrastate service provided on an authorized interstate route constitutes a predatory practice in contravention of the transportation policy set forth in section 10101(a) of this title, the Commission shall prescribe the rate applicable to such service.

(f) The Commission may take action (1) under this section only after a full hearing, or (2) with respect to a rate, rule, or practice of a motor common carrier of passengers, in accordance with the procedures established by the Commission

under subsection (e)(3)(B) of this section. Action of the Commission under this section supersedes State law or action taken under State law in conflict with the action of the Commission.

Pub.L. 95—473, Oct. 17, 1978, 92 Stat. 1444; Pub.L. 96—448, Title II, § 214(a)—(c)(1), Oct. 14, 1980, 94 Stat. 1913; Pub.L. 97—261, § 17(a), Sept. 20, 1982, 96 Stat. 1117.

Staggers Rail Act of 1980, PL 96-448, 94 Stat. 1895.

GOALS

§ 3. The purpose of this Act is to provide for the restoration, maintenance, and improvement of the physical facilities and financial stability of the rail system of the United States. In order to achieve this purpose, it is hereby declared that the goals of this Act are—

(1) to assist the railroads of the Nation in rehabilitating the rail system in order to meet the demands of interstate commerce and the national defense;

(2) to reform Federal regulatory policy so as to preserve a safe, adequate, economical, efficient, and financially stable rail system;

(3) to assist the rail system to remain viable in the private sector of the economy;

(4) to provide a regulatory process that balances the needs of carriers, shippers, and the public; and

(5) to assist in the rehabilitation and financing of the rail system.

CALIFORNIA CIVIL CODE—COMMON CARRIERS

§ 2169. Obligation to accept freight

A common carrier must, if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry.

Enacted 1872.

CALIFORNIA PUBLIC UTILITIES CODE**§ 486. Filing of rate schedules: Contents**

Every common carrier shall file with the commission and shall print and keep open to the public inspection schedules showing the rates, fares, charges, and classifications for the transportation between termini within this State of persons and property from each point upon its route to all other points thereon; and from each point upon its route to all points upon every other route leased, operated, or controlled by it; and from each point on its route or upon any route leased, operated, or controlled by it to all points upon the route of any other common carrier, whenever a through route and a joint rate has been established or ordered between any two such points. If no joint rate over a through route has been established, the schedules of the several carriers in such through route shall show the separately established rates, fares, charges, and classifications applicable to the through transportation.

§ 761. Authority to fix rules, equipment, services, etc.: When compliance by public utility required

Whenever the commission, after a hearing, finds that the rules, practices, equipment, appliances, facilities, or service of any public utility, or the methods of manufacture, distribution, transmission, storage, or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the commission shall determine and, by order or rule, fix the rules, practices, equipment, appliances, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed. The commission shall prescribe rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules.

§ 762. Authority to require changes in physical property of public utilities

Whenever the commission, after a hearing, finds that additions, extensions, repairs, or improvements to, or changes

in, the existing plant, equipment, apparatus, facilities, or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that new structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements, or changes be made or such structures be erected in the manner and within the time specified in the order. If the commission orders the rection of a new structure, it may also fix the site thereof. If the order requires joint action by two or more public utilities, the commission shall so notify them and shall fix a reasonable time within which they may agree upon the portion or division of the cost which each shall bear. If at the expiration of such time the public utilities fail to tile with the commission a statement that an agreement has been made for a division or apportionment of the cost, the commission may, after further hearing, make an order fixing the proportion of such cost to be borne by each public utility and the manner in which payment shall be made or secured.

§ 763. Authority to order running of additional cars, etc.

Whenever the commission, after a hearing, finds that any railroad corporation or street railroad corporation does not run a sufficient number of trains or cars, or possess or operate sufficient motive power, reasonably to accommodate the traffic, passenger or freight, transported by or offered for transportation to it, or does not run its trains or cars with sufficient frequency or at a reasonable or proper time having regard to safety, or does not stop its trains or cars at proper places, or does not run any train or car upon a reasonable time schedule for the run, the commission may make an order directing such corporation to increase the number of its trains or cars or its motive power or to change the time for starting its trains or cars or to change the time schedule for the run of any train or car, or to change the stopping place or places thereof. The commission may make any other order that it determines to be reasonably necessary to accommodate and transport the traffic, passenger or freight, transported or offered for transportation.

§ 2113. Punishment of utilities, etc., for contempt: Remedy in addition to others prescribed

Every public utility, corporation, or person which fails to comply with any part of any order, decision, rule, regulation, direction, demand, or requirement of the commission or any commissioner is in contempt of the commission, and is punishable by the commission for contempt in the same manner and to the same extent as contempt is punished by courts of record. The remedy prescribed in this section does not bar or affect any other remedy prescribed in this part, but is cumulative and in addition thereto.

ADDRESS ALL COMMUNICATIONS
TO THE COMMISSION
CALIFORNIA STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102
TELEPHONE: (415) 887-

Public Utilities Commission

STATE OF CALIFORNIA

January 6, 1981

R. D. Krebs, Vice Pres. Operations
Southern Pacific Transportation Co.
One Market Plaza
San Francisco, CA 94105

Dear Sir:

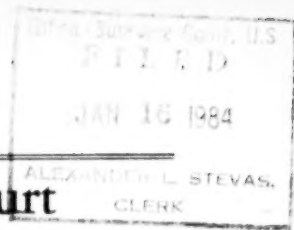
In October of 1980 the United States Congress passed the Rail Act of 1980 (Staggers Act). This piece of legislation allows the federal government through the Interstate Commerce Commission (ICC) to pre-empt regulation of intrastate rail rates by state authorities. The Public Utilities Commission of the State of California (CPUC) believes this usurpation of state authority is unconstitutional and as a result has asked to intervene in a suit against the United States and the ICC filed by the State of Texas and the Texas Railroad Commission. This suit asserts that the Staggers Act's pre-emption provision is in violation of the Tenth Amendment. Therefore, this letter puts your company on notice that the CPUC is challenging the Staggers Act as unconstitutional and that the CPUC believes that California law is still valid and should be complied with.

Very truly yours,

GRETCHEN DUMAS

Legal Counsel

No. 83-985



In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

SOUTHERN PACIFIC TRANSPORTATION CO.,
Appellant,

VS.

PUBLIC UTILITIES COMMISSION OF CALIFORNIA, et al.,
Appellees,

SOUTHERN PACIFIC TRANSPORTATION CO.,
Appellant,

VS.

PUBLIC UTILITIES COMMISSION OF CALIFORNIA, et al.,
Appellees.

On Appeal from the Supreme Court of California

MOTION TO DISMISS OR AFFIRM

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and the Public Utilities
Commission of the
State of California*

QUESTION PRESENTED

May SP once again raise the issue of federal preemption, which in prior litigation was decided against SP by the California Supreme Court and held to be *res judicata* by the U.S. District Court and the Ninth Circuit Court of Appeals?

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SOUTHERN PACIFIC TRANSPORTATION Co.,
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VS.

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Appellees.

On Appeal from the Supreme Court of California

MOTION TO DISMISS OR AFFIRM

The Appellee (the Commission) moves the Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Supreme Court of the State of California, on the grounds that the appeal rests on adequate state grounds and does not present a substantial federal question.

I

OPINIONS BELOW

The opinions below are correctly stated in Appellant's (SP's) Jurisdictional Statement.¹

II

JURISDICTION

Jurisdiction is asserted by SP under Title 28, United States Code § 1257(2). (Jur. St. 2).

III

STATEMENT OF THE CASE

1. On May 18, 1978 the County of Los Angeles (County) and appellee, the California Department of Transportation (Caltrans), filed complaints with the Commission, requesting that it order SP to institute commuter rail service between Los Angeles and Oxnard, California. Public hearings began on July 30, 1979. On June 3, 1980, the Commission issued Decision (D.) 91847, requiring SP to operate the commuter rail service sought by the County and Caltrans, both of whom were to subsidize SP's costs. The Commission granted rehearing at SP's request, limited to further consideration of the operational feasibility of combining commuter service with existing service on the line. On October 30, 1980 SP filed for review with the California Supreme Court of issues in the decision which were not reheard. The rehearing resulted in two Commission decisions, issued April 7, 1981, essentially reaffirming

¹Reference herein to Appendices are to those attached to the Jurisdictional Statement, unless otherwise indicated. "Jur. St." followed by a number refers to pages of the text of the Jurisdictional Statement.

the original decision requiring SP to provide the service (see paragraph 3 *infra*.) Also in April, after election of a new Board of Supervisors, the County dropped out of the case.

2. The federal Staggers Rail Act of 1980 (Staggers Act or Staggers), PL 96-448, 94 Stat. 1895, was enacted effective October 1, 1980. This Act was Congress' response to what it perceived as an increasing financial crisis among the nation's railroads due to inadequate freight revenues. It established "a regulatory process that balances the needs of the *carriers, shippers, and the public.*" (Emphasis added.) (H.R. Rep. No. 1430, 96th Cong., 2d Sess. 80, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4110, 4111.) The decline in the railroads' market share discussed at length in the House Report was in freight traffic. (See H.R. Rep. No. 1035, 96th Cong., 2d Sess. 38, U.S. Code Cong. & Ad. News at 3983.) Nowhere in the text of the Act is passenger service mentioned.³

Staggers established a system whereby states could seek certification by the Interstate Commerce Commission (ICC) of their standards and procedures for regulating

³A reading of the entire Staggers Act shows that Congress limited its application to freight rates, classifications, rules and practices.

Title II of Staggers is entitled "Railroad Rates and Inter-carrier Practices." It contains twenty-nine of the Act's sixty-three sections. It allows rail carriers, with stated exceptions, to raise or lower freight rates without ICC oversight. Title III is entitled "Railroad Cost Determinations." It authorizes the ICC to create a uniform freight accounting system and establishes a Railroad Accounting Principles Board to promulgate freight cost accounting principles. Title IV of the Act, "Railroad Modernization Assistance," addresses the sale, abandonment or discontinuance of rail-

intrastate freight transportation. States which did not seek certification by January 29, 1981 lost such jurisdiction, but this loss did not vest the ICC with jurisdiction; such happened only if a state sought but was denied certification. (See 49 U.S.C. Sections 10501(c), 11501(b)(4)(B).) In response to this, the ICC *sua sponte*, without statutory authorization, devised a further procedure whereby states which had not sought certification could request the ICC to assume jurisdiction.

road freight lines. The next three titles of the Act deal with labor protection payments and miscellaneous matters. Staggers, by its terms, is concerned exclusively with freight revenues.

The word "passenger" does not appear in Staggers; moreover, the Act is replete with language which precludes its application to passenger matters. For example, it provides that if a rail carrier has "market dominance over the transportation to which a particular rate applies, the rate . . . [charged] must be reasonable." (Emphasis added.) (49 U.S.C. Section 10701a(b)(1).) Applying such antitrust analysis to subsidized passenger service would be absurd. Another section provides that "[i]n any proceeding to determine the reasonableness of a rate described in [section 10701a(b)(1)](A) the shipper challenging such rate shall have the burden of proving that such rate is not reasonable . . ." (Emphasis added.) (49 U.S.C. Section 10701a(b)(2).) The reference to "shipper" unequivocally indicates that the rates that may be challenged are shipping rates and that passenger fares are beyond the scope of the section.

Section 202 of Staggers defines "fixed and variable cost" as "all cost incurred by rail carriers in the transportation of *freight* . . ." (Emphasis added.) (49 U.S.C. Section 10709(d)(1)(A).)

Section 203 of Staggers again confirms the absence of concern with passenger traffic. That section adds to the Interstate Commerce Act a new provision, Section 10707a, entitled "Zone of Carrier Rate Flexibility." This provision allows a carrier to increase its rate annually, with certain limitations varying with inflation. The base rate is established initially as the rate in effect on the effective date of the Act and is adjusted after two years and then

In early 1982, the ICC notified California of pending loss of jurisdiction to regulate intrastate rail *rates*. (The ICC proceeding, Ex Parte #388, was entitled "State Intrastate Rail Rate Authority".) In response, the Commission requested the ICC in writing to assume jurisdiction over intrastate *freight rates*. The ICC's May 11 order, which is merely one in a series of orders issued in Ex Parte #388, notified California, among others, that it had lost "all jurisdiction to regulate intrastate rail *rates*." (Emphasis added.) The order added the ICC would assume jurisdiction over "intrastate rail transportation" in those states having so requested. California had only requested the ICC to assume jurisdiction over freight rate matters. Given the language of Staggers, the scope of Ex Parte #388, and the Commission's request, the only conclusion is that new ICC jurisdiction in California was limited to intrastate freight rate matters.

3. In April, 1981, following rehearing, the Commission issued Decisions 92862 and 92863, directing negotiations

at five-year intervals. New section 10707a(a)(1)(A) defines the term "base rate" and begins "base rate" means, with respect to the transportation of a particular commodity . . ." The term "commodity" precludes passenger traffic. The exclusive concern with freight traffic is apparent.

Other sections of the Act similarly contain language that is incompatible with application to passenger matters. See, e.g., Section 205 ("products or commodities"), Section 208 ("shipper"), Section 211 ("transportation of property" and "shipper").

SP points to paragraphs 21 and 25 of 49 U.S.C. Section 10102, which define "rate" and "transportation", respectively, as pertinent to resolving the intent of Congress in enacting Staggers. However, those definitions were operative prior to Staggers. They did not grant jurisdiction to the ICC over intrastate commuter service prior to Staggers, nor do they after Staggers.

between Caltrans and SP, and restating its original order requiring SP to construct stations and publish a tariff governing the service. These last requirements were subsequently stayed to give SP and Caltrans time to pursue further negotiations. In its petition to the Commission for rehearing of these subsequent decisions, which was denied, SP first raised its Staggers Act preemption argument. SP filed a second petition for review of these decisions in the California Supreme Court (S.F. 24316), in the course of which the preemption issue was again raised, both by the Commission and by SP. (See Appx. pp. 252a, 270a; Appx. to Petition for Writ of Certiorari in *Southern Pacific Transportation Co. v. Public Util. Comm., et al.*, Docket No. 83-1053, pp. 74a-76a, 90a-94a.)

4. Meanwhile, in December, 1980, the State of Texas had filed suit against the ICC challenging the constitutionality of the Staggers Act. California and numerous other states became intervenors, as did SP and several other railroads. The sole issue raised by plaintiffs California, Texas, New York, and Kansas was the constitutionality of Staggers' preemption of state regulation of intrastate *freight rates*. See Plaintiff-Intervenors' Memorandum in Support of Plaintiffs' Motion for Summary Judgment, *Texas v. United States* (Civil No. A-80-CA-487). Defendants, and most definitively the ICC, maintained that Staggers preemption over such *freight rates* was constitutional. See Federal Defendants' Opposition to Plaintiff-Intervenors' Motion for Partial Summary Judgment, *Texas v. United States, supra*. This suit, summarily decided at the federal District Court level against Texas, accepted defendants' argument that the degree to which Staggers pre-

empted states from *such rate regulation* was not unconstitutional.

The *Texas* litigation, now on appeal, had no bearing on the PUC proceedings in California. SP presents no support for its specious conclusion to the contrary. (Jur. St. 9, 22.)

5. On December 23, 1981 the California Supreme Court denied without written opinion SP's petition for writ in S.F. 24316, as well as its earlier appeal of the Commission's original decision. SP did not seek review of this denial in the U.S. Supreme Court, even though such review was available under 28 U.S.C. Section 1257.

6. On June 2, 1982, after five additional months of unsuccessful negotiations between Caltrans and SP had resulted only in SP's refusal to institute the service ordered in D.91847, the Commission issued D.82-06-045. This decision renewed its order to SP to construct the passenger facilities and improvements previously found needed, to commence such work on June 15 and to complete it by October 15, 1982, and to file tariffs for the commencement of the service.

7. SP did not seek rehearing of the June 2 decision before the Commission or review before the California Court, nor did it begin implementing the order. Rather, SP challenged said decision before the United States District Court for the Northern District of California (C-82-3074-MHP). SP alleged federal preemption under the Staggers Act and undue burden on interstate commerce. On August 9, 1982, the District Court granted summary judgment against SP on grounds of *res judicata*, i.e., that SP

had raised or could have raised before the California Court all the issues it sought to bring before the District Court and therefore SP had had its day in court. (Appx., pp. 250a-258a.)

8. On August 17, 1982 SP filed a notice of appeal of the District Court's order with the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit ultimately upheld the order on September 27, 1983. (*Southern Pacific Transportation Co. v. Public Util. Comm., et al.*, No. 82-4466; Appx., pp. 261a-271a.) On December 23, 1983 SP filed a Petition for Writ of Certiorari with this Court seeking review of the Ninth Circuit decision. (*Southern Pacific Transportation Co. v. Public Util. Comm., et al.*, Docket No. 83-1053.)

9. Meanwhile, on August 4, 1982, Caltrans filed an application before the Commission for an order to show cause why the officers and directors of SP should not be found in contempt for failure to comply with the terms of the June 2 order.

10. On September 29, at formal Commission hearings, SP's Vice President of Maintenance testified SP had no current plans to comply with D.82-06-045 or to begin the construction required by that order. Likewise, SP counsel stated on the record that SP did not intend to comply with the requirement to construct the passenger facilities ordered.

11. The Commission on October 6 issued an interim decision (D.82-10-031) following hearings on September 27 and 29 on Caltrans' application for an order to show cause. This decision granted Caltrans an immediate right of entry onto SP property at several locations in order to construct

the passenger facilities which SP had refused to construct. A concurrent decision denied SP's untimely petition to reopen and set aside the order of June 2, 1982. Pursuant to the right of entry order, Caltrans constructed several passenger station facilities.

12. On October 8 SP petitioned the California Supreme Court for a temporary stay under provisions of the California Public Utilities Code, which was denied on October 12.

13. On October 18, after weekend negotiations and an agreement by SP to operate the trains while still pursuing its avenues, if any, for legal relief, the Commission issued D.82-10-041 again ordering the service, and the service finally commenced.

14. On October 20 SP filed for an injunction pending appeal in the U.S. District Court, which was denied on November 3. The Court found the status quo had changed substantially, that further litigation was pending before the California Supreme Court, and that SP was not likely to prevail on the merits of its appeal. (Appx., pp. 259a-260a.)

15. On October 27 SP sought rehearing before the Commission of the Commission's two October decisions.

16. On November 3 SP filed an Emergency Motion for Injunction Pending Appeal in the U.S. Court of Appeals for the Ninth Circuit (No. 82-4466). This was denied on November 12.

17. Also on November 3 the Commission dismissed Caltrans' application for an order to show cause why SP

should not be held in contempt on the grounds that construction of station platforms and related facilities was complete, locomotives had been leased by SP, and the commuter service had commenced on October 18.

18. On November 18 SP filed another motion for temporary stay with the California Supreme Court, denied on December 23.

19. On January 14, 1983 SP sought review in the California Supreme Court of Decisions 82-10-031 and 82-10-041 (S.F. 24525).

20. On February 7, 1983, without seeking PUC authorization, SP stopped running the commuter service on the ground that Caltrans was not making the requisite subsidy payments to SP. (See para. 26, *infra*.)

21. On February 9 SP resumed the service.

22. On February 11 the PUC issued an order to show cause why SP should not be held in contempt for violating D.82-10-041 by stopping the service. Hearing was held February 15.

23. On February 17 the PUC found SP to be in contempt and assessed an appropriate fine (Decision 83-02-079).

24. On March 11 the PUC issued D.83-03-027, authorizing temporary suspension of the commuter service because 1) Caltrans and SP could not come to agreement on the amount of subsidy required and on related liability and equipment issues, 2) Caltrans was uncertain whether present funding was sufficient to meet expenses already incurred or to be incurred in future, and 3) the Governor's budget

for fiscal year '83-'84 did not fund the service. While the PUC formally retained authority to reconsider should circumstances change, this order in practical terms made the service a dead letter.

25. SP timely sought California Supreme Court review of D.83-02-079 (S.F. 24573). The California Court without opinion denied review of both S.F. 24525 and 24573, on August 18 and September 14 respectively. These denials are the ones at issue in the instant case.

26. Meanwhile, in late 1982, after issuance of the federal District Court order against it, SP began several related proceedings before the ICC. It filed a tariff which it alleges entitles it, *inter alia*, to subsidy payments from Caltrans greatly exceeding those contemplated by the Commission. (See para. 20, *supra*.) It subsequently filed an application under Staggers for discontinuance of the service, which has been ruled on by an ICC administrative law judge favorably to SP. Both of these actions were taken in derogation of all court orders issued against SP. Both are in various stages of appeal.

IV

ARGUMENT

A. SP Has Misstated the Question Presented by This Case

SP asserts that two federal questions are presented; to wit: (1) whether a state failing to seek certification under the federal Staggers Act can order an interstate railroad to provide intrastate commuter passenger service; and (2) whether California can hold in contempt a railroad and two of its managing officers for suspending that service under a right allegedly conferred in a tariff which the railroad was allegedly required to file with the ICC.

By stating the questions in the above manner, SP is attempting to deflect the Court's attention from the real issue in this case: whether, in 1981, SP's failure to seek this Court's review of the California Supreme Court's denial of a petition for writ of review wherein SP's claims under the Staggers Act were raised before and rejected by that court, resulted in those claims becoming *res judicata* in all subsequent litigation between the same parties on the same issues. As is demonstrated in this Motion, this question must be answered affirmatively. Consequently, the decisions SP now protests rest on adequate and independent state grounds and raise no federal question within the jurisdiction of this Court.

B. The Decisions Below Rest on Adequate and Independent State Grounds

1. SF 24525 Was Decided on the Basis of California Law Alone

This Court has, in recent years, followed the rule that:

"... Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." *Durley v. Mayo*, 1956, 351 U.S. 277, 281, citing *Stembridge v. Georgia*, 1952, 343 U.S. 541, 547. (Emphasis in original.)

The California Supreme Court in S.F. 24525 denied SP's petition for writ of review without written comment. But the Commission's and Caltrans' primary contention was that because the federal preemption question was before that same Court in 1981, that Court's action in denying SP's petitions for writ of review in 1981 made the issue

res judicata under principles of California law. Thus it was barred from the California Court's consideration in S.F. 24525.

This conclusion is not changed by this Court's recent decision in *Michigan v. Long*, 1983, U.S., 77 L.Ed. 2d 1201. This decision states:

"Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." U.S. at, 77 L.Ed.2d at 1214.

Here, the California Court did not specify the grounds for its denial. However, when all of the different aspects of this case are examined, the decision does not fairly appear to rest primarily on federal law. Rather, it is clear that an independent and adequate state ground must form the basis for that denial.

SP, after having been denied a hearing in the California Court in 1981, sought an injunction against the Commission in federal District Court, raising the same federal preemption claim as had been raised and rejected in the California Court. The District Court agreed with the Commission and Caltrans that the issue had been or should have been raised in the California Supreme Court, and that it was *res judicata* for the purposes of the federal proceeding. The Ninth Circuit agreed and affirmed the District Court's ruling.

While the federal courts' decisions were based on *res judicata* principles as applied to the federal courts, the same rule applies, pursuant to California law, to issues raised in a subsequent lawsuit in the California courts on the same cause of action between the same parties. *Slater v. Blackwood*, 1975, 15 C.3d 791, 795; *Busick v. Workmen's Comp. App. Bd.*, 1972, 7 C.3d 967, 973; *Panos v. Great Western Pack. Co.*, 1943, 21 C.2d 636, 639. The California Supreme Court has applied this rule to appeals of Commission decisions in *Consumers Lobby Against Monopolies v. Public Util. Comm.*, 1979, 25 C.3d 891, 901.

The Staggers argument was raised to the California Supreme Court in 1981.³ That Court's rejection of SP's petitions for review is a decision on the merits for *res judicata* purposes. *Consumers Lobby, supra*; *Pacific Tel. and Tel. Co. v. Public Util. Comm.*, 9th Cir., 1979, 600 F.2d 1309, cert. denied 444 U.S. 920. SP did not seek review by this Court of the California Court's decision, and is thus barred by *res judicata* principles articulated in the California cases cited above from bringing its claims to this Court now. See also *Durley v. Mayo, supra*, 351 U.S. at 284; *Grubb v. Public Util. Comm. of Ohio*, 1930, 281 U.S. 470, 477-479. It is no defense that SP did not argue its claim as strenuously as it later decided it should have. California law provides that *res judicata* is a complete bar to later

³As stated *supra*, SP raised its Staggers claim in an attachment to its petition before the Commission for rehearing of the two orders issued in April, 1981. SP then submitted that document, as well as D.93211 where the Commission stated its disagreement with SP's Staggers argument, to the California Court as part of SP's supplement to its first petition for review. Finally, the issue was raised again in S.F. 24316, the 1981 petition to the California Court, where SP devoted seven pages of its reply brief to its Staggers claim.

suits between the same parties on the same cause of action, not only as to matters heard but as to matters that could have been heard in support of or in opposition thereto. *Slater v. Blackwood, supra*; *Price v. Sixth Dist. Agric. Assn.*, 1927, 201 C. 502, 511. See also *Grubb, supra*, 281 U.S. at 478.

SP's arguments that the Staggers issue could not have been before the California Court in 1981 are completely without merit. Its argument that the Commission had deferred substantive provisions of its order while the Texas litigation was proceeding has no basis in fact. Even assuming *arguendo* that SP's "substantive provisions" argument has some meaning, it becomes totally transparent when it is realized that the "final" Commission order, so characterized by SP in its petition to the California Court in S.F. 24525, was issued on June 18, 1982, five months before the November 3, 1982 order was issued by the Texas District Court.

SP's further argument that it had pointed out to the California Court that the Staggers issue was not before that Court but before the Texas court fails on two counts. First, SP cites no rule of law which allows a party to decide, where a state and federal court have concurrent jurisdiction of a federal issue, that the state court cannot hear the issue where that issue has been raised by one of the parties and responded to by the other. The exception, where the abstention doctrine is applied by a three-judge federal court so that a state court may first consider the state issues, and where a party has specifically reserved the right to return to federal court if necessary on the federal issues, is not present here. Hence, *England v. Board of Med. Exam.*, 1964, 375 U.S. 411, is inapplicable.

Further, the issue of whether Staggers preempts states from ordering publicly subsidized commuter passenger train service was never before the Texas court. The defendants, including SP and the federal Department of Justice on behalf of the ICC, argued vigorously that the only area where Staggers preempted states was in rate regulation. The district court, in sustaining defendants' motion for summary judgment, concurred. Rate regulation, however, involves neither the passenger versus freight issue nor the question of whether states can order a railroad operating both inter- and intrastate to provide publicly subsidized intrastate commuter service.

Dump Truck Owners Assn. v. Public Util. Comm., 1977, 434 U.S. 9, is equally inapplicable. In that case, the Commission had granted rehearing while the appeal to this Court was pending, and was reconsidering the rate order appellants had challenged as unconstitutional. This reconsideration might well have made the federal claim moot; thus it was reasonable for this Court to have dismissed the action as being premature. In the case at bar, the rehearing granted by the Commission had been concluded prior to SP's filing S.F. 24316 in the California Court. While certain aspects of the decision had been stayed, the Commission was not in the process of reconsidering any issues related to SP's federal claim. Moreover, it is completely inconsistent for SP to claim that although no cognizable federal issue existed in the California proceedings, such an issue did exist in the Texas proceedings, which did not even remotely involve review of a state order that a railroad provide intrastate passenger commuter service.

Finally, SP's reliance on *Cox Broadcasting Corp. v. Cohn*, 1975, 420 U.S. 469, is misplaced. *Cox* involved the

issue of finality of the state judgment. Here, there is no doubt whatsoever that the California judgment in 1981 was final on the federal issue and appealable to this Court. This judgment was not subject to further review in the state courts. Moreover, no further proceedings in the state court were anticipated, except inasmuch as such could be predicted to be inevitable from SP's past litigation behavior. Finally, even assuming *arguendo* that further state issues could be anticipated to be before the California Supreme Court, appeal of the Stagers issue before this Court was ripe under *Cox*. As in that case, even if SP prevailed in those proceedings on nonfederal grounds, if the California Court had erroneously upheld the Commission's order, those further proceedings should never have occurred at all. *Cox, supra*, 420 U.S. at 485.

2. SF 24573 Was Clearly Decided on Independent State Grounds

The order SP challenged in S.F. 24573 was, plainly and simply, an enforcement order issued by the Commission in response to SP's willful disobedience of a lawfully issued Commission order. California Public Utilities Code Section 2113 gives the Commission authority to hold in contempt a party who fails to comply with a lawful Commission order. While SP had asserted a right to suspend the commuter services based on its ICC tariff, neither Caltrans nor the Commission has ever conceded the validity of this tariff, which is currently being challenged by Caltrans before the ICC.

More importantly, SP had obtained no judicial restraints against the enforcement of the Commission's orders; all courts to which the issue of the lawfulness of those orders

had been presented had sustained them. As in S.F. 24525, the Staggars issue had long since become *res judicata*. Thus the Commission was within its authority under state law in finding SP and two of its officers in contempt and fining them appropriately. The California Court had no federal issue properly before it, and thus needed to decide none in denying SP's petition for writ of review.

C. The Denial of SP's Petitions for Writ of Review by the California Supreme Court Raises No Federal Question

No federal question has been presented to this Court. SP's claims that the Commission's orders were barred by Staggars Act preemption were deemed not cognizable because of *res judicata* by the federal District Court, the Ninth Circuit Court of Appeals, and, by undeniable inference, the California Supreme Court. It has long been settled that *res judicata* does not present a substantial federal question to this Court. *City and County of San Francisco v. Itsell*, 1890, 133 U.S. 65, 67.

CONCLUSION

For the foregoing reasons, the appeal filed by SP presents no question warranting review of the decisions below, and should be dismissed. Alternatively, the judgments below should be affirmed.

Dated, San Francisco, California

January 13, 1984.

Respectfully submitted,

JANICE E. KERR

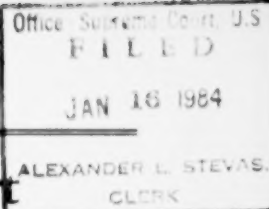
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No. 83-985



In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

SOUTHERN PACIFIC TRANSPORTATION CO.,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF CALIFORNIA, et al.,
Appellees.

SOUTHERN PACIFIC TRANSPORTATION CO. et al.,
Appellants,

vs.

PUBLIC UTILITIES COMMISSION OF CALIFORNIA, et al.,
Appellees.

On Appeal From the Supreme Court of California

MOTION TO DISMISS

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On Appeal From the Supreme Court of California

MOTION TO DISMISS

MOTION

Appellee, the California Department of Transportation (Caltrans), hereby moves to dismiss the appeal by the Southern Pacific Transportation Company (SP) from the judgment of the California Supreme Court, filed August 18, 1983, in SF 24525. Although Caltrans supports dismissal of the appeal as consolidated, since Caltrans was not a party to SF 24573, no argument will be submitted with respect to it. Caltrans submits, however, as it did before

the California Public Utilities Commission (CPUC), that the CPUC had the authority, upheld in SF 24573, to hold SP and its officers in contempt.

The appeal from SF 24525 must be dismissed on the following grounds:

1. The record does not show that the alleged federal preemption issue posed by SP was raised and expressly passed on;

2. Evaluation of circumstances shown in the record, and consideration of state law applicable to the case, demonstrate that the judgment of the California Supreme Court can rest on an independent and adequate state ground;

3. SP is barred by the doctrine of res judicata from further pursuing its preemption claim; and

4. No substantial federal question is presented by SP's appeal.

STATEMENT OF THE CASE

On January 14, 1983, SP petitioned the California Supreme Court for review of two decisions of the CPUC which augmented a much earlier, and now final, decision dated June 3, 1980. These two later decisions are 82-10-031 (125a)¹ and 82-10-041 (131a). On August 18, 1983, SP's petition was denied without opinion in SF 24525. (1a.) That judgment is the subject of this appeal.

By way of background, the earlier CPUC decision, Decision 91847 issued on June 3, 1980, is the original decision of the CPUC which ordered SP to operate the

¹This and all following such references are to SP's Appendix submitted with its jurisdictional statement.

service. (3a-65a.) Between June 3, 1980, and June 16, 1981, the CPUC issued three other and further decisions which amended various details of the original decision. These were Decisions 92862, 92863 and 93211. These three decisions together with the original decision were, some years ago, also brought by SP to the California Supreme Court for review. On December 23, 1981, the California Supreme Court denied these petitions for review.

SP did not appeal from or seek further review by this Court of these earlier judgments of the California Supreme Court. (262a.) Instead, SP awaited the issuance of a further implementing CPUC decision on June 2, 1982 (115a), and then sought an injunction against that decision in the United States District Court, Northern District of California, arguing that the Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895 (Staggers) had pre-empted[®] all CPUC authority over all intrastate rail transportation. (250a-256a.) On August 9, 1982, the District Court ruled that the issue had been settled by the California Supreme Court, and that its judgments rendered on December 23, 1981, operated as a bar to SP's complaint. (252a-253a.) The Ninth Circuit Court of Appeals affirmed. *Southern Pacific Transportation Co. v. Public Utilities Commission, et al.*, (9th Cir. 1983) 716 F2d 1285, petition for writ of certiorari pending.

ARGUMENT**I**

THE RECORD DOES NOT SHOW THAT THE PRE-EMPTION ISSUE POSED BY SP WAS RAISED AND EXPRESSLY PASSED ON BY THE CALIFORNIA SUPREME COURT IN THE PROCEEDING FROM WHICH THIS APPEAL IS TAKEN, SF 24525

The California Supreme Court denied SP's petition for review of CPUC Decisions 82-10-031 and 82-10-041 *without opinion*. The record shows that in Decision 82-10-031, SP argued to the CPUC against the "authority" of the CPUC to permit Caltrans to enter SP's property and construct station facilities thereon. No federal basis for this challenge to the CPUC's authority is set forth. (127a.) In Decision 82-10-041, SP's "objections to the jurisdiction of the commission" were noted by the CPUC without any reference to a federal basis for such objection. (132a.) SP also advised the CPUC that it could not undertake construction of the remaining station facilities based on its "position in its pending action in the federal courts challenging the commission's jurisdiction over the subject matter." (132a-133a.) However, this did not include an express challenge to the validity of the CPUC's order in Decision 82-10-041 based on Staggers.

This Court has stated in *Lynch v. New York* (1934) 293 U.S. 52, 54:

"It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary

to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it . . .”

Appellant has the burden to show the existence of a federal question, properly presented. *Durley v. Mayo* (1956) 351 U.S. 277, 284-285.

Although SP has presented its preemption argument at various times during many prior proceedings, and discusses it at length in its jurisdictional statement, SP does not show that it was raised and expressly passed on in the two CPUC decisions reviewed by the California Supreme Court in SF 24525. The appeal must be dismissed. *White River Lumber Co. v. State of Arkansas* (1929) 279 U.S. 692.

II

INDEPENDENT STATE GROUNDS COULD SUPPORT THE JUDGMENT

In *Stembridge v. State of Georgia* (1952) 343 U.S. 541, this Court held (at 547):

“ . . . Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment. [Citations omitted.]” (Emphasis by the Court.)

See also: *Durley v. Mayo*, *supra*, 351 U.S. 277, 281.

This Court reexamined the issue of adequate and independent state grounds in *Michigan v. Long* (1983) U.S., 103 S.Ct. 3469, and continued to support the concept that appeal lies only from a state decision which “fairly appears to rest primarily on federal law, or to be interwoven with the federal law . . .” (103 S.Ct. at 3476.) Such

is not the case here. The judgment herein, rendered without opinion, does not appear in any way to rest on federal law. As will be shown below, it undoubtedly was decided on the basis of state law alone.

California law is designed (1) to provide for the thorough review of CPUC decisions and (2) to ensure that, once the review processes are completed, the decisions shall become final and not subject to further challenge.

To this end, California Public Utilities Code section 1731 provides for rehearing by the CPUC with respect to "any order or decision" of the CPUC, and denies further judicial relief where rehearing is not sought.*

California Public Utilities Code section 1756 provides for direct review by the California Supreme Court of all orders and decisions of the CPUC following decision on rehearing or where rehearing has been denied.

California Public Utilities Code section 1709 provides that the orders and decisions of the CPUC which have become final shall be conclusive in all collateral actions or proceedings.

These statutory concepts are designed to bring finality to the decisions of the CPUC. As stated in *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 633: "That conclusiveness arises by operation of law." When the CPUC has acted, and a party is dissatisfied, that party's interests are protected by its right to petition the California Supreme Court for a writ of review. (*Id.*, at 632.) And, as

*This and all other sections of the California Public Utilities Code referred to are reproduced in an appendix hereto.

the California Supreme Court further observed in the *Western Air Lines* case, a party who is still dissatisfied has the further "right to apply to the Supreme Court of the United States for relief on federal constitutional grounds." (*Id.*)

SP's present position is quite clear. SP believes it can lie in the weeds, allowing CPUC decisions to become final, and then appeal previously argued matters again and again before the California Supreme Court at each instance of a further implementing order relating to the CPUC's earlier decisions.

Such a procedure is not permitted under California law. As the California Supreme Court stated in *Northern Cal. Assn. v. Public Util. Com.* (1964) 61 Cal.2d 126 at 135:

"... [Petitioner] cannot now cure its failure seasonably to seek judicial review of the certificate decision by the device of a series of late-filed petitions, basing its right to review on the latest among them, when, in fact, it is seeking review of the basic decision. If such a device were allowed, one obtaining a certificate from respondent commission could never safely act under it without fear of later attack."

Appellant has failed to show that the judgment of the California Supreme Court does not rest on the foregoing state law principles. As stated in *Durley v. Mayo, supra*, 351 U.S. 277, 281:

"In the face of these expressions of the law of Florida, petitioner, in order to establish our jurisdiction, must demonstrate that neither of these state grounds can account for the decision below. . . ."

Moreover, these concepts of California law are based on general law, and not the Constitution, treaties, or statutes of the United States.

See *City and County of San Francisco v. Itsell* (1890) 133 U.S. 65:

"... In the present case, the record of the pleadings, findings of fact, and judgment shows that it was unnecessary for that court to decide, and its opinion filed in the cases and copied in the record shows that it did not decide, any question against the plaintiff in error, except the issue whether the former judgment rendered against it, and in favor of the grantor of the defendants in error, was a bar to this action. That was a question of general law only, in no wise depending upon the constitution, treaties, or statutes of the United States. *Chouteau v. Gibson*, 111 U.S. 200, 4 Sup. Ct. Rep. 340. Writ of error dismissed, for want of jurisdiction."

III

SP IS BARRED BY THE DOCTRINE OF RES JUDICATA FROM FURTHER PURSUING ITS PREEMPTION CLAIM

As noted earlier, the CPUC on June 30, 1980, entered its basic decision herein, Decision 91847. (3a.) Said decision found that public convenience and necessity required that SP commence passenger train service between Union Station in Los Angeles and Oxnard, with various intermediate stops.

Following petition for rehearing by SP, there were further proceedings before the CPUC, but the basic decision requiring the service was left intact. The CPUC did, how-

ever, stay the effect of certain implementing paragraphs, a stay which remained in effect until June 2, 1982.*

In the meantime, SP pursued its prior petitions for review before the California Supreme Court arguing, *inter alia*, that the CPUC had lost jurisdiction as a result of preemption by reason of the Staggers Rail Act of 1980.

After the California Supreme Court denied SP's petitions for review, SP did not pursue an appeal or other proceeding before this Court. Hence all matters previously concluded were now finally concluded and embraced in the judgments of the California Supreme Court.

On June 2, 1982, the CPUC rendered Decision 82-06-045 (115a.) That decision dissolved the previously imposed stay and specifically ordered SP to take those actions necessary to proceed with the service previously ordered. That decision is now also final *under state law*, no petition for rehearing having been filed. Cal. Pub. Util. Code, §§ 1731 and 1756; *Consumers Lobby Against Monopolies v. Public Utilities Commission* (1979) 25 Cal.3d 891, 902.

No purpose would be served in repeating the able discussion, on the subject of *res judicata*, by the Ninth Circuit which is now before this Court pursuant to SP's separate petition for a writ of certiorari. It is clear that SP cannot avoid the preclusive effect of the California Supreme Court

*SP argues in its Jurisdictional Statement (p. 22) that the purpose of the stay was to give the CPUC opportunity to challenge the constitutionality of Staggers in another forum. *Nothing in the record supports this contention.* It is submitted that a more likely purpose of the stay was to give SP an opportunity to pursue its challenges to state authority by way of writ of review before the California Supreme Court.

judgments which followed SP's petitions from earlier decisions of the CPUC. The appropriate time to have challenged these judgments, before this Court, was within the time provided for in 28 U.S.C. section 2101. That time has long since expired. SP's present appeal should therefore be dismissed.

IV

SP'S ARGUMENT THAT PREEMPTION ISSUES WERE NOT "RIPE" IS READILY REFUTED

SP argues that it could not have appealed to this Court from the December, 1981, judgments of the California Supreme Court because, at that time, issues arising from the state *administrative proceedings* were not ripe for review. SP asserts that the case was still pending before the CPUC and might be resolved on nonfederal grounds.

This argument is wholly without merit.

The judgments of the California Supreme Court, *which are the judgments in question on this issue*, were final. That court considered SP's preemption arguments and failed to grant SP's requested relief. Thus the highest court in California approved the CPUC's continuing exercise of jurisdiction with regard to this intrastate service.

The rule is well settled that where a litigant asserts that it is immune from a regulatory program of the sort asserted against it, the case is ripe for decision. (See generally Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*, § 3532, p. 244.) When the question is whether it is constitutional to fasten an administrative procedure onto a litigant, this purely legal issue is ripe

for decision. *Public Utilities Commission v. United States* (1958) 355 U.S. 534; *Abbott Laboratories v. Gardner* (1967) 387 U.S. 136, 149.

Moreover, if SP's argument were accepted, the result would be that the issue still is not ripe for consideration. The service has been suspended (156a), and the CPUC is holding the proceeding open for additional evidence on public subsidy issues and other matters (156a-157a). Indeed, under this hypothesis, the very case relied upon by SP, *Dump Truck Owners Association v. Public Utilities Commission* (1977) 434 U.S. 9, would indicate that, if the issue was not ripe in 1981, it certainly is not ripe now.

V

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

A. The Staggers Amendments Only Affected Freight Rates

Although California has not sought certification, this could only affect California's jurisdiction to regulate rates; it could not affect California's jurisdiction over intrastate rail transportation in general, including orders that service be provided. 49 U.S.C. section 11501(b)4(A) provides in part:

". . . Any State authority . . . which does not seek certification may not exercise any jurisdiction over intrastate rates, classification, rules and practices until it receives certification under this subsection."

The Staggers Act and its congressional history further shows that Staggers' preemption in uncertified states is limited to *freight* rates. Congress wanted to increase rail

freight revenues by allowing the railroads to compete more effectively with other modes of transportation through "a regulatory process that balances the needs of the carriers, shippers, and the public." 1980 U.S. Code Cong. & Ad. News, 4110, 4111. The decline in the railroad's market share, discussed at length in the House Report, concerned freight traffic rather than passenger service. 1980 U.S. Code Cong. & Admin. News, 3983.

In respect to the Act itself, 49 U.S.C. section 10709(d) (1)(A) defines "fixed and variable cost" as "all cost incurred by rail carriers in the transportation of freight. . . ." In determining fixed and variable costs, the commission is directed to use the ICC's Rail Form A which is a *freight* costing methodology. (49 U.S.C. § 10705a(m)(1).) See also 49 U.S.C. section 10707(a)(1)(A) which defines the term "base rate" with respect to ". . . the transportation of a particular commodity. . . ." The term "commodity" precludes consideration of passenger traffic. Title III of the Act further authorizes the ICC to create a uniform freight accounting system and establishes a Railroad Accounting Principles Board to promulgate freight cost accounting principles. By contrast, the Act nowhere mentions passengers, nor does it require uniform passenger accounting principles.

B. SP's Reliance on California's "Request" Is Misleading and Misplaced

SP, in its attempt to show that substantial federal issues are involved, relies heavily on a claim that the CPUC has affirmatively relinquished its jurisdiction to the ICC. SP argues that "California *requested* that the ICC assume

jurisdiction over California intrastate rail transportation, and the ICC took jurisdiction on May 11, 1982." (Jurisdictional Statement, p. 17.) SP's argument buckles, however, when it goes on to disclose that California's request was actually limited to *freight* service. SP then seeks to avoid this fact by arguing that there is no basis under Staggers for bifurcating the ICC's jurisdiction, citing 49 U.S.C. section 11501(b)(4), subsection (A).

In so arguing, SP hopelessly confuses the preemptive provisions of 49 U.S.C. section 11501(b)(4), subsection (A) with a nonstatutory, administratively adopted, process developed by the ICC for acceding to state requests that it assume jurisdiction.

Subsections (A) and (B) of 49 U.S.C. section 11501(b)(4) are the two relevant provisions under Staggers pertaining to changes in state and federal jurisdiction over intrastate rail matters. The operative language in the two sections reads markedly different and it does not follow that a preempted loss of state jurisdiction automatically equates with a gain of federal jurisdiction.

As noted earlier, subsection (A) prohibits uncertified states from exercising jurisdiction over "intrastate rates, classifications, rules, and practices . . ." It applies *both* to situations where a state certification request is made and denied as well as to situations where certification is not requested at all.

Subsection (B) is the only provision under Staggers which purports to grant any jurisdiction to the ICC over intrastate service. Its grant of jurisdiction is limited, however, *solely* to situations where a state *has requested and*

has been denied certification, a situation not applicable to California. In all other respects, the ICC is prohibited by 49 U.S.C. section 10501(b) from exercising jurisdiction over intrastate rail transportation.

Observing the limited nature of its authority under subsection (B) (namely that subsection (B) authorizes ICC regulation "only where a State has unsuccessfully applied to the Commission for certification . . ."), the ICC, in Ex Parte 388, Decision dated January 25, 1982, agreed to "accede" to state "requests" that the ICC exercise jurisdiction. (See appendix to the Petition for a Writ of Certiorari, p. 97a, at pp. 99a-101a.)

Considering these matters together, it becomes most clear that SP's argument about "bifurcating" the ICC's jurisdiction simply reads into Staggars something *which is not there*. Subsection (A) relied upon by SP, deals with *state jurisdiction*—it has no bearing on *ICC jurisdiction*. And, whatever jurisdiction the ICC may have obtained from its "request" procedure, flows not from subsections (A) or (B) but instead from Ex Parte 388 and the ICC's willingness to honor state requests. Obviously, the ICC cannot "accede" to more than has been asked. In any event, SP's argument that a request limited to freight is to be treated as a request to regulate all forms of rail transportation does not find support in Staggars or, for that matter, elsewhere. Neither does it raise any substantial federal question requiring argument before this Court.

CONCLUSION

For these reasons, the appeal filed herein should be dismissed.

Respectfully submitted,

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(COUNSEL OF RECORD)

Attorneys for Appellee

January 1984

APPENDIX

Excerpts from the California Public Utilities Code.

Section 1709:

"In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.

Section 1731:

"After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing. The commission may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has filed application to the commission for a rehearing before the effective date of the order or decision, or, if the commission fixes a date earlier than the 20th day after issuance as the effective date of the order or decision, unless the corporation or person has filed such application for rehearing before the 30th day after the date of issuance, or before the 10th day after the date of issuance in the case of an order issued pursuant to Article 5 (commencing with Section 816) and Article 6 (commencing with Section 851) of Chapter 4 of this division relating to security transactions and the transfer or encumbrance of utility property."

Section 1756:

"Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable at a time and place then or thereafter specified by court order and shall direct the commission to certify its record in the case to the court within the time therein specified."

FILED

FEB 13 1984

ALEXANDER L. STEVAS.
CLERK

No. 83-985

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

SOUTHERN PACIFIC TRANSPORTATION CO.
Appellant,

v.

PUBLIC UTILITIES COMMISSION
OF CALIFORNIA, ET AL.,
Appellees.

SOUTHERN PACIFIC TRANSPORTATION CO. ET AL.,
Appellants,

v.

PUBLIC UTILITIES COMMISSION
OF CALIFORNIA, ET AL.,
Appellees,

On Appeal from the Supreme
Court of California

REPLY BRIEF FOR APPELLANTS

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PUBLIC UTILITIES COMMISSION
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Appellees.

On Appeal from the Supreme
Court of California

REPLY BRIEF FOR APPELLANTS

In these consolidated appeals, SP contends that two 1983 decisions of the California supreme court denying review of orders of the California Public Utilities Commission ("the 1983 Denials") erroneously refused to recognize that, effective May 11, 1982, California was deprived of authority by the Staggers Rail Act of 1980 to order new intrastate rail passenger services. In a related Petition for a Writ of Certiorari, No. 83-1053, SP contends that the ninth circuit's refusal to enjoin the PUC from enforcing its order of June 2, 1982 (which ordered SP to build passenger stations and file tariffs) and from taking any further steps to implement the proposed commuter service, was an erroneous application of the doctrine of *res judicata*.

Rather than meet these points directly, appellees PUC and Caltrans have argued that SP is foreclosed from raising its federal preemption arguments because SP did not seek review in this Court of two California supreme court orders of December 23, 1981, denying review of previous PUC orders ("the 1981 Denials") and have moved to dismiss the appeals ("Motions to Dismiss"). Appellees have waived any reply to SP's Petition for Certiorari.

Appellees have given no reason why this Court should not now stop California's continuing and wrongful assertion of authority expressly taken from it by the Staggers Rail Act of 1980, conduct which has deprived and will continue to deprive SP and its managing officers of rights which Congress conferred in plain and unambiguous language.

I.

THIS COURT HAS JURISDICTION OF THESE APPEALS

A. The Federal Question Was Properly Presented Below

Appellees argue that the federal question here raised was not presented below. That question in its simplest terms is whether the Interstate Commerce Commission's May 11, 1982 assumption of jurisdiction over California rail transportation pursuant to the Staggers Rail Act of 1980 stripped California of authority to order new intrastate rail passenger service. The record is clear that the federal question was raised by SP at the first opportunity and was continuously pressed by SP at every stage of this litigation.

In the first appeal, the "Service Order" case, S.F. No. 24525, SP stated its objections at the outset of the PUC hearings:

"MISS HARRIS [SP]: First of all, this is a special appearance by Southern Pacific, as we indicated in our motion seeking an evidentiary hearing in this proceeding, and also in our petition to reopen the record and set aside Decision 82 06 045 in Complaint 10575, that in making this special appearance, we are not waiving our jurisdictional and other defenses which are the subject of pending Federal Court proceedings. Specifically, Decision 82 06 045, which is the subject of the contempt complaint case

and the petition to reopen, is in our view in excess of the PUC jurisdiction. And this is because of the Staggers Act and the subsequent PUC request to the ICC to assume jurisdiction over California intrastate rail transportation and the ICC assumption of that jurisdiction on May 11, 1982.

As a result of that event, the subject matter in the PUC order on June 2 is now under the exclusive jurisdiction of the ICC, and we are continuing to press that position in our Federal Court proceedings." (Vol. 28, T. 2829, September 27, 1982; Reply App. at 1a.)¹

Caltrans acknowledged that the PUC's subject matter jurisdiction was at issue:

"MR. SOLANDER [Caltrans]: Your Honor, as I understand special appearances, it is mainly for the purpose of challenging the jurisdiction of this Commission." (Vol. 28, T. 2837-2838, September 27, 1982; Reply App. at 2a.)

Thus, SP's jurisdictional defense was squarely raised in front of the PUC in the Service Order case. SP then petitioned the California Supreme Court for review of the Service Order on the grounds that, as of May 11, 1982, the subject transportation was under the exclusive jurisdiction of the ICC. (Reply App. at 6a.)²

In SP's second appeal, the "Contempt Order" case, S.F. No. 24573, the sole issue raised by SP was federal preemption, specifically, that SP's temporary suspension of the service was pursuant to its tariff filed with the ICC in compliance with the Staggers Act, which ousted the PUC from jurisdiction over intrastate rail service. The PUC set forth SP's federal preemption arguments in its Contempt Order (Appeal App. at 148a), although it rejected SP's position. These same preemption arguments were forcefully raised in SP's petition for review (Reply App. at 15a), and are now properly before this Court.

¹ In referring to the Appendix to this Reply, "Reply App. at ____" will be used. "Appeal App. at ____" refers to the Appendix attached to SP's opening brief in No. 83-985; "Petition App. at ____" refers to the Appendix to the Petition for Certiorari in No. 83-1053.

² A second issue was whether the PUC had had eminent domain authority to order Caltrans to enter onto SP's land to build stations and relocate tracks. A decision on this issue could not have resolved the federal question presented.

B. Appellees Have Failed to Meet The "Plain Statement" Test Recently Enunciated in *Michigan v. Long* Which Determines This Court's Jurisdiction

Appellees contend that the 1983 decisions of the California supreme court denying review *might* have rested upon res judicata, a nonfederal ground, and, therefore, consistent with its practice as enunciated in *Durley v. Mayo*, 351 U.S. 277 (1956) and *Stembridge v. State of Georgia*, 343 U.S. 541 (1952), this Court should decline review. However, *Durley* and *Stembridge* were recently substantially modified by *Michigan v. Long*, 51 U.S.L.W. 5231 (U.S. July 6, 1983). In *Michigan v. Long*, the Court announced that it now will "require a clear and express statement that a decision rests on adequate and independent state grounds" before it declines jurisdiction. 51 U.S.L.W. at 5234, n. 7. This is referred to by the Court as the "plain statement" rule. *Ibid*.

The Court recognized in *Michigan v. Long* that it had over the years announced a number of varied and sometimes inconsistent principles to decide the issue of its jurisdiction from state decisions.

"[W]e openly admit that we have thus far not developed a satisfying and consistent approach for resolving this vexing issue." *Id.* at 5233.

The Court concluded, therefore, that

"it is appropriate to reexamine our treatment of this jurisdictional issue in order to achieve the consistency that is necessary." *Ibid*.

The Court determined after analysis that

"we have jurisdiction in the absence of a plain statement that the decision below rested on an adequate and independent state ground." *Id.* at 5235.

The Court specifically stated that, when presented with "ambiguous or obscure" adjudications by state courts, the Court will not be deterred from determining the validity of the state action under federal law. *Id.* at 5234. As justification for this holding, the Court observed as a practical matter that when it has vacated and continued an appeal for clarification in doubtful cases, the result has been unsatisfactory. It specifically

cited its experience in *Dixon v. Duffy*, 344 U.S. 149 (1952), where the Court was unable to secure from the California supreme court an answer as to whether the California court's summary dismissal of the appeal rested on adequate state grounds. *Id.* at 5233, n. 5. Thus, *Michigan v. Long* finds a federal basis for a challenged state decision where, as here, the federal issue was the basis of the challenge below, and the state court does not otherwise explain its result.

The two 1983 decisions at issue here, like *Dixon v. Duffy*, *supra*, were entered without opinion. Federal preemption was the basis of SP's objection to the PUC's conduct, and it provided the sole defense for Weber, McNear, and SP in the contempt proceeding. In the absence of a "plain statement" to the contrary, *Michigan v. Long* compels the conclusion that this Court has jurisdiction to hear these appeals.

C. The 1981 Denials Did Not Create A Res Judicata Bar To These Appeals

Appellees argue that SP is barred from appealing the 1983 decisions by res judicata as the result of the California supreme court's summary denials of review in 1981 of PUC decisions entered in 1980 and 1981. But, those 1981 PUC decisions placed no burden on SP, other than to negotiate. Thus, denial was appropriate because, as the California supreme court held in *Consumers' Lobby, Etc. v. Public Util. Com'n.*, 25 C.3d 891, 904, 603 P.2d 41, 48 (1979), where the injury is still speculative, an otherwise meritorious petition will be denied, without explanation, as premature.³

SP's Petition for Writ of Certiorari in No. 83-1053 ("Petition") contains multiple reasons why res judicata was erroneously applied by the district court and the ninth circuit to foreclose SP from obtaining relief from the PUC's June 2, 1982 order (Petition at 9-24). That Order, issued a month after the ICC assumed jurisdiction over intrastate rail transportation in California, forced the construction of stations and the commencement of service. Appellees elected not to reply to SP's

³ This reasoning, apt in 1981, could not apply when the PUC later forced the construction of stations and operation of trains, and was threatening to jail recalcitrant railroad executives.

petition. However, the points there stated apply with equal force to appellees' arguments that *res judicata* bars any appeal to this Court of the California supreme court's 1983 denials of review of the PUC's Service Order and Contempt Order.

As SP pointed out in its Petition, under California law *res judicata* is not applied where the basis for the previous decision is uncertain. *Title Guarantee & Trust Co. v. Monson*, 11 C.2d 621, 632 (1938), *Irwin v. Irwin*, 69 C.A.3d 317, 322, 138 Cal.Rptr. 9, 11 (1977). (Petition at 16). Since the 1981 Denials are simply one-sentence denials, with obvious alternative grounds, there is no way of knowing whether any Staggers Act issues were decided.⁴ Thus, under California law, these 1981 Denials are not *res judicata*.

Additionally, SP's Petition called attention to the fact that the California supreme court was advised that the Staggers Act issue was in litigation already in federal court in *Texas v. United States*, No. A 80 CA 487 (W.D. Texas, filed December 12, 1980), and that SP did not wish the California court to decide the issue. (Petition at 10-11). Following the logic and policy of *England v. Medical Examiners*, 375 U.S. 411 (1964), the 1981 Denials should not thus create a *res judicata* bar.⁵

Finally, SP argued that the *res judicata* doctrine must give way if its application in a particular case collides with a higher policy that flows from the Constitution itself. See, e.g., *Kalb v. Feuerstein*, 308 U.S. 433 (1940). (Petition at 17-18). Congress in the Staggers Act exercised its unquestioned power over

⁴ SP did not raise the Staggers Act preemption issue in either of the 1981 proceedings; it was initially raised by PUC and Caltrans in their Opposition (Petition App. at 74a), and SP in its Reply specifically informed the California court that it did "not believe the issue is properly before the Court at this time." (Petition App. at 91a.) SP further stated that "should the Court desire to address this important issue, it would seem appropriate that further briefing would be called for from the parties . . ." *Id.* The fact that the California court did not ask for more briefing further substantiates that the court did not decide the issue.

⁵ Appellees argue in this regard that federal preemption over passenger rail service was not decided in the *Texas* case because the distinction was not raised by California or other states (PUC Motion to Dismiss, p. 6). This is no answer, for the *Texas* court upheld the Staggers Act in its entirety, and the preemptions in it extend to all rail transportation, passenger as well as freight. California, having attacked the Staggers Act, was given an opportunity to try to carve an exception for its passenger services, but elected not to do so.

interstate commerce and determined that states should no longer be able to force railroads to engage in state-sought local services at state-dictated prices. No California supreme court action, or inaction, should be used to frustrate Congress' intent.

Appellees attempt to distinguish *Dump Truck Owners Assn. v. Public Util. Comm.*, 434 U.S. 9 (1977) by claiming that the PUC was not reconsidering the federal issue after the 1981 Denials. (PUC Motion to Dismiss at 16). What *Dump Truck* held was that if the PUC on further consideration were to decide the proceeding on *any* ground that might moot the case, this Court should not hear the matter. In 1981, when the 1981 Denials were issued, the PUC could have mooted the case if it had decided not to order the service once it was clear that Caltrans had no intention of paying revenue-adequate compensation. (Petition at 13-14)⁶.

D. The 1983 Denials Run To A New Cause Of Action

The 1983 denials in the Service Order and Contempt Order cases cannot be barred by *res judicata* in any event because they are based on a new cause of action which occurred after the 1981 Denials. (Petition at 23-25) Specifically, the new cause of action arose from the ICC's assumption of jurisdiction on May 11, 1982. As a consequence of the ICC's assumption of jurisdiction, all rail transportation within California was deemed to be subject to the Interstate Commerce Act (49 U.S.C. §11501(b)(4)(B)) and California expressly lost authority to issue orders requiring train service. 49 U.S.C. §10501(c).

Until January 29, 1981, California had retained jurisdiction. However, once it failed to file for certification, it lost that jurisdiction on January 29, 1981, pursuant to 49 U.S.C. §11501(b)(4)(A). During the period January 29, 1981 until May 11, 1982, when the ICC assumed jurisdiction, California intrastate rail transportation was in a non-regulated limbo; that is, not under the jurisdiction of either the ICC or the PUC.

⁶ Appellees argue, apparently seriously, that the result of *Dump Truck* is that these appeals are still not ripe for consideration because the PUC is still holding the matter open. But that is not so; the contempt convictions of SP. Weber, and McNear are final and appellants look to this Court to annul — now — those wrongful orders.

When the 1981 Denials were issued, the ICC had not yet assumed jurisdiction. When the PUC made its Service Order in October 1982, and later issued its Contempt Order, that had changed. The ICC had assumed jurisdiction, and, therefore, was the only regulatory agency with decisional power over California intrastate rail transportation. Even assuming that the 1981 California supreme court denials were a holding that California could retain jurisdiction during the regulatory limbo period (January 29, 1981 to May 10, 1982), they could not have precluded the ICC's subsequent and independent takeover of jurisdiction on May 11, 1982.

As stated in SP's Petition, this Court has held that a second suit based on a new cause of action can only be barred if the claims raised in the second suit were

"actually litigated and determined in the original action."

Cromwell v. County of Sac., 94 U.S. 351, 353 (1876).

This Court reaffirmed that principle in *Commissioner v. Sunnen*, 333 U.S. 591, 597-598, 601-602 (1948).

California has likewise held that a party can only be barred by res judicata as to issues which were actually litigated and determined in the earlier action. *Younger v. Jensen*, 26 C.3d 412-413, 605 P.2d 813, 823 (1980). Although SP firmly believes that the Staggers Act was not litigated or decided in any way, shape, or form in the California supreme court in 1981, the question as to whether California had any jurisdiction after May 11, 1982, clearly could not have been considered or decided at that time.

II.

THE QUESTION OF STAGGERS ACT PREEMPTION IS A SUBSTANTIAL FEDERAL QUESTION

At issue in these proceedings is whether California can continue to assert extrajurisdictional authority, backed by threat of its summary criminal contempt powers, over intrastate rail services and the uses which California railroads may make of their tracks and facilities and the prices they may charge.

That the ICC has asserted jurisdiction over all intrastate service, freight and passenger, is undisputed. The ICC's May 11, 1982 order in *Ex Parte 388, State Intrastate Rail Rate*

Authority—P.L. 96-448, 365 ICC 700 states: "... the Commission shall assume jurisdiction over intrastate rail transportation in [California] ..." (Appeal App. at 188a). Thereafter, the ICC expressly asserted jurisdiction over the Oxnard commuter service in accepting SP's rail passenger tariff for the Oxnard trains without suspension or investigation. Suspension Case No. 70965, California Special Train Service, Southern Pacific, Notice (December 1, 1982; Appeal App. at 192a).

The ICC's jurisdiction over the Oxnard passenger service was reaffirmed by Judge Paul Clerman for the ICC in Finance Docket 30123, *Southern Pacific Transportation Company Discontinuance of Passenger Train Service in Ventura and Los Angeles Counties, Ca* (unprinted decision served December 2, 1983; Appeal App. at 211a-212a):

"Unless it is presumed that the Congress was exceedingly careless in the drafting of section 214 of Staggers, and that the Commission has been equally careless in the implementation thereof, the conclusion is warranted in light of the foregoing that rail passenger operations are within the purview of the statute and the rulemaking proceeding. The conclusion is impelled, accordingly, that the Commission's decisions and orders in the latter proceeding, to the extent appropriate, apply as well to rail passenger operations. In other words, where the Commission in its decisions in Ex Parte No. 388 has made the finding that a State, such as California, has 'lost all jurisdiction to regulate intrastate rail transportation', that 'transportation' by statutory definition and in the absence of affirmative indication to the contrary must be taken to include also rail passenger operations."

Appellees refused to accede to the ICC's jurisdiction and contend that the ICC's order in Ex Parte 388 could not have conferred jurisdiction over California intrastate passenger service because California requested only that the ICC assume jurisdiction over intrastate *freight* rate matters. (PUC Motion to Dismiss, p. 5).

Whether the PUC's two request letters (Reply App. at 24a and 26a), ambiguous at best, should be given the interpretation urged for them by the PUC, the fact is that the ICC interpreted them as a request for full assumption of jurisdiction in Califor-

nia and entered its order accordingly. That order was not appealed by the PUC. Nor has the PUC ever filed any standards or procedures for passenger service regulation; thus, the ICC could not permit California to retain any passenger service jurisdiction. 49 U.S.C. §11501(b)(3)(A) and (4)(A).

Finally, the PUC has characterized the Oxnard service as a "dead letter" (PUC Motion to Dismiss, p. 11), but it refuses to treat it as such. The PUC has nowhere indicated that it will voluntarily desist from regulating intrastate passenger service, nor has it vacated the contempt convictions of SP, McNear and Weber or in any way demonstrated that violations of SP's Staggers Act rights will not recur. Appellees' past conduct indicate that they will not relinquish their hold on California passenger matters until told by the Court to stop.⁷

The Court should act now to stop California's efforts to place local priorities and local service demands beyond the explicit reach of the Staggers Rail Act of 1980, and should order California to forthwith stop activities which frustrate the goals and objections set forth by Congress for the railroad industry in the Staggers Act. The contempt convictions of Weber, McNear, and SP should be set aside.

DATED: February 11, 1984.

Respectfully submitted,

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⁷ The PUC's suspension order explicitly reserves jurisdiction to decide the level of public subsidy and to decide when and under what condition the service should resume. Appeal App. at 172a.

APPENDIX

**Reporters Transcript, San Francisco, CA,
September 27, 1982, Volume 28**

[Page 2829] are confident that Southern Pacific is indeed in contempt of the Commission's orders right now.

ALJ MALLORY: All right. Miss Harris, do you have an opening statement?

MISS HARRIS: Yes, I do.

STATEMENT OF MISS HARRIS

MISS HARRIS: First of all, this is a special appearance by Southern Pacific, as we indicated in our motion seeking an evidentiary hearing in this proceeding, and also in our petition to reopen the record and set aside Decision 82 06 045 in Complaint 10575, that in making this special appearance, we are not waiving our jurisdictional and other defenses which are the subject of pending Federal Court proceedings specifically Decision 82 06 045, which is the subject of the contempt complaint case, and the petition to reopen is in our view in excess of the PUC jurisdiction. And this is because of the Stagers' Act and the subsequent PUC request to the ICC to assume jurisdiction over California intrastate rail transportation and the ICC assumption of that jurisdiction on May 11, 1982.

As a result of that event, the subject matter in the PUC order on June 2 is now under the exclusive jurisdiction of the ICC, and we are continuing to press that position in our Federal Court proceedings.

Regarding the business before the Commission

* * *

[Page 2837] I assume those actions are revisions of the track and construction of station platforms and parking and lighting facilities.

MR. SOLANDER: No, your Honor.

ALJ MALLORY: I haven't read this document, so I don't know exactly what is asked.

First, I would like to have you state more specifically what actions you contemplate that SP does by October 1st, and then how you would accomplish those actions yourself within the time period between October 1 and October 18. I am assuming that. I am not familiar with what is in the document, so I am making some assumptions.

I assume that what you ask is the right to construct certain facilities yourself.

And Ms. Harris contends that what was in the original plans requires 18 months to construct.

Apparently you are going to do something in 18 days that Southern Pacific couldn't do in 18 months.

Will you explain how you would do this?

MR. SOLANDER: Certainly. Before I do that, though, your Honor, I want to respond to SP's contention that it is entitled to make a special appearance in this proceeding and—

ALJ MALLORY: I don't think that is necessary.

MR. SOLANDER: Your Honor, as I understand special appearances, it is mainly for the purpose of [Page 2838] challenging the jurisdiction of this Commission.

Now, what SP wants to do is go through an entire proceeding, bring in evidence, challenging all sorts of matters relating to issues that have been litigated before this proceeding.

I would move to strike Ms. Harris' statement except to the extent that it relates to Stagers.

I think the Commission would be offended by the actions of the Southern Pacific to sit here and request what might amount to days of hearings when it says you don't even have jurisdiction to make the order. I think that is absolutely unforgivable.

ALJ MALLORY: The purpose of these hearings is certainly not to relitigate anything that has been litigated before, including jurisdictional issues.

It's my understanding that a Federal District Court has already considered the Staggers Act pleadings of SP and denied them by its order.

Certainly you can come in on any basis you want, SP can come in on any basis it wants, but it is before the Commission, and the Commission is going to react as we have jurisdiction in this issue.

We are not going to go again into all of the jurisdictional issues.

IN THE
SUPREME COURT OF THE
STATE OF CALIFORNIA

SOUTHERN PACIFIC TRANSPORTATION
COMPANY, a corporation,

Petitioner,

v.

No. S.F. 24525

PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA AND THE INDIVID-
UAL MEMBERS THEREOF,

Respondents;

DEPARTMENT OF TRANSPORTATION
STATE OF CALIFORNIA

Real Party in Interest.

PETITION FOR WRIT OF REVIEW
WITH
MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF

TO THE HONORABLE ROSE E. BIRD, CHIEF JUSTICE,
AND TO THE HONORABLE ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE STATE OF
CALIFORNIA

Southern Pacific Transportation Company ("SP") respectfully requests this Court to inquire into and determine the lawfulness of two decisions of the Public Utilities Commission of the State of California ("Commission" or "Respondents"): Decision No. 82-10-031 dated October 6, 1982, and Decision No. 82-10-041 dated October 18, 1982, both issued in Case No. 82-08-01 upon the complaint of the Department of Transportation, State of California ("CalTrans"), the real party in interest.¹

¹ Decision No. 82-10-031 is Appendix A hereto. Decision No. 82-10-041 is Appendix B hereto.

SP seeks review of the decisions because, by them, the Commission has purported to assert authority over California intrastate rail transportation which Congress has expressly taken away, and has taken SP's property for the use and benefit of CalTrans in violation of the Federal and State Constitutions and the Eminent Domain Law of this State. As more fully described below, the issues raised by this petition have not been determined by this Court in any other proceeding.

Jurisdiction of the Court

This petition is filed pursuant to the jurisdiction of the Court to review the decisions of Respondents under §§1756-1767 of the Public Utilities Code. On October 26, 1982, SP filed its application for rehearing of Decision No. 82-10-031 and Decision No. 82-10-041.² By Decision No. 82-12-093 of December 15, 1982, the Commission denied the application.³

Grounds for Petition

SP seeks review of the cited decisions and orders of the Commission on the following grounds:

By ordering SP to operate passenger trains between Oxnard and Los Angeles, the Commission purported to exercise an authority which the Congress has expressly taken away by the enactment of the Staggers Act⁴ and the failure of the State to be certified to regulate intrastate rail transportation in accordance with federal standards. The making of such orders is in excess of the Commission's authority, contravenes the Supremacy Clause of the federal Constitution, and violates the oaths of the respondent Commissioners to uphold the Constitution of the United States.

² The application also sought rehearing of Decision No. 82-10-010. This petition does not seek review of that decision. A copy of SP's application for rehearing is Appendix C hereto.

³ A copy of Decision No. 82-12-093 is Appendix D hereto.

⁴ The Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895 (the "Staggers Act"), was passed by Congress October 1, 1980, was approved October 14, 1980 and was made effective as of October 1, 1980.

By granting CalTrans the right to enter and occupy SP's property for the purposes of relocating its tracks and constructing and maintaining stations and parking facilities on such property, the Commission has taken SP's property without compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution, of Article I, §19, of the California Constitution and the Eminent Domain Law of this state.

Questions Presented

The decisions and orders of the Commission of which review is sought present the following questions for review by this Court:

1. Does the Commission, on and after the assumption by the Interstate Commerce Commission of jurisdiction over California intrastate rail transportation pursuant to the Staggers Act, have jurisdiction and authority to require SP to perform rail passenger service between points in California?

2. May the Commission, consistently with the federal and state Constitutions and the Eminent Domain Law of this state, authorize CalTrans to enter and occupy SP's property, to relocate SP's tracks and to construct stations and parking facilities on such property, and require SP to make its property available to CalTrans for those purposes?

Statement of the Case

The orders of which review is sought arise out of the filing on May 18, 1978, by the County of Los Angeles and CalTrans of a complaint before the Commission in another proceeding (Case No. 10575) seeking an order directing SP to establish a commuter rail service between Oxnard and Los Angeles.⁵ By Decision No. 91847 in Case No. 10575, 3 Cal. P.U.C. 2d 679

⁵ On April 7, 1981, the motion of the County of Los Angeles to withdraw was granted by Decision No. 92862.

(1980), the Commission ordered SP to build station and parking facilities in accordance with plans and specifications to be submitted by CalTrans and to operate two week-day commuter passenger trains between Oxnard and Los Angeles. By reason of a petition for rehearing and subsequent stays of the effective date of the order in Decision No. 91847, the order to institute service contained in Decision No. 91847, as modified by subsequent decisions, was stayed until June 2, 1982, when the stay was lifted and the order to operate the commuter trains became effective for the first time (Decision No. 82-06-045).

While the foregoing proceedings in Case No. 10575 were pending, the Staggers Act was enacted effective October 1, 1980. As more particularly described below, the Commission was not certified by the ICC to regulate California intrastate rail rates (including passenger fares) in accordance with federal standards. As a consequence, on May 11, 1982, the ICC assumed exclusive jurisdiction to regulate all intrastate rail transportation within California pursuant to 49 U.S.C. §11501(b)(4).⁶ As a result of that assumption, the Commission lost its authority under the police power of the State to require the performance of intrastate rail transportation by carriers subject to the ICC's jurisdiction, such as SP, 49 U.S.C. §10501(c)(1). Therefore, when the Commission, on June 2, 1982, lifted its stay of prior orders directing the construction of station and parking facilities and the institution of the commuter service, it had lost its power to require SP to operate the trains involved.

Because SP believed this to be the case, and was challenging the Commission's June 2 order in the federal courts, SP did not commence the construction of platforms and parking facilities by June 15, 1982 as contemplated by that order.

⁶ Ex Parte No. 388, State Intrastate Rail Rate Authority—P.L. 96-448, 365 I.C.C. 700 (May 4, 1982), 47 Fed. Reg. 20220 (May 11, 1982). The text of cited sections of Title 49, United States Code, is reproduced in Appendix E.

On August 4, 1982, CalTrans filed with the Commission a complaint for an order to show cause why SP should not be found in contempt (Case No. 82-08-01). Hearings on the complaint were held on September 27 and 29, 1982. Thereafter, on October 6, 1982, the Commission issued its Decision No. 82-10-031 granting CalTrans the right to construct stations and parking facilities on SP property at Simi Valley and Panorama City and to relocate SP's track 6065 at Simi Valley, and setting a contempt hearing for 10:00 a.m. October 18, 1982.

Following weekend telephone conferences on October 16 and 17, 1982, between representatives of SP, CalTrans, the Commission staff and Commissioner Gravelle, the Commission issued its further order (Decision No. 82-10-041, October 18, 1982) directing SP to lease locomotives from Amtrak, granting CalTrans the right to construct stations and parking facilities at six additional locations and ordering SP to operate the commuter service, thus confirming Commissioner Gravelle's oral directive given at the conclusion of the proceedings of October 17.⁷

On October 8, 1982, SP filed with this Court a petition for writ of review and other relief and a motion for temporary stay (No. S.F. 24476), seeking review of and a stay of the October 6, 1982 order. On October 12, 1982, the motion for temporary stay was denied.

On October 14, 1982 SP filed in S.F. 24476 its Amended Petition for Extraordinary Relief (Prohibition) asking the Court to restrain the Commission from enforcing any of its orders issued to SP on or after May 11, 1982 when the ICC assumed jurisdiction over California intrastate rail transportation.

On October 26, SP filed with the Commission its application for rehearing of the October 6 and October 18 decisions. On November 18, 1982 SP filed with this Court its further motion for stay of the enforcement of both orders.

On December 15, 1982, the Commission denied the application for rehearing (Decision No. 82-12-093). On December 23, 1982, this Court denied SP's further motion for stay.

⁷ The complaint in the contempt proceeding was dismissed by Decision No. 82-11-032, effective December 3, 1982. However, the Commission continued to conduct proceedings in that case thereafter.

Related Proceedings

California Supreme Court. In connection with proceedings in Case No. 10575 prior to May 11, 1982 when the ICC assumed exclusive jurisdiction over California intrastate rail transportation, SP on two occasions sought a writ of review of Commission orders. These petitions were not directed to any order issued in Case No. 82-08-01 and did not raise, and could not have been raised, the questions presented by this petition.

On October 3, 1980, in S.F. 24220, SP petitioned this Court for a writ to review Decision No. 91847 as modified by Decision No. 92230. The grounds of the petition were that (a) the Commission acted beyond its jurisdiction under State law in ordering SP to provide a passenger service which SP had not dedicated itself to provide, and (2) the Commission unlawfully failed to consider the availability of alternative bus service with the advantages of lower cost, greater fuel efficiency and flexibility of service.

On July 16, 1981, in No. S.F. 24316, SP sought review of Decision No. 92862 which denied the motions of SP and Greyhound to reconsider the need for the proposed service and to dismiss the proceeding in view of the withdrawal of the County of Los Angeles as a complainant and of Decision No. 92863 which ordered the commencement of commuter service. When that petition was filed, the order to begin operations had been stayed by Decision No. 93118 of May 11, 1981. Such stay remained in effect until June 2, 1982.

The petition in S.F. 24316 did not raise, and could not have raised, the issue of federal preemption because the ICC had not then assumed jurisdiction over California intrastate rail transportation, and the order to commence service had not become final.

Similarly, neither petition could have raised the issue of the taking of SP's property by the Commission for the benefit of CalTrans as the orders of October 6, 1982 and October 18, 1982 permitting CalTrans to construct stations and parking lots had not then been issued.

By minute order of December 23, 1981, this Court denied without comment the two petitions for review in S.F. 24220 and S.F. 24316.⁸

Federal Courts. Following the lifting of the stay by decision No 82-06-045 of June 2, 1982, SP promptly raised the issue of congressional preemption in federal court in an action for injunctive relief filed June 15, 1982.⁹ This was the first opportunity SP had to raise this issue after the ICC had assumed jurisdiction over California intrastate rail service on May 11, 1982 and the Commission had lifted its stay of the order requiring the construction of station and parking facilities and the operation of trains.

In the mistaken belief that this Court's denial of the previous petitions was res judicata of the issue of the Commission's jurisdiction, the district court on August 9, 1982 denied the motion for preliminary injunction and granted summary judgment for the Commission. The issue of federal preemption is now on appeal to the Court of Appeals for the Ninth Circuit. The question of taking of SP's property did not arise until the order of October 6, 1982 and therefore is not pending in any other court.

WHEREFORE, SP requests the Court to issue its writ of review with respect to the Commission's Decision No. 82-10-031 and Decision No. 82-10-041, and upon such review to determine that, in ordering SP to provide intrastate rail transportation service and in granting CalTrans the right to enter and occupy SP's property, the Commission has acted in excess of its authority contrary to the Constitution of the United States, the Constitution of the State of California, and the Eminent Domain Law of this state. The Court is further requested to

⁸ 30 Cal.3d (Adv.) No. 2, Minutes, p. 3.

⁹ *Southern Pacific Transportation Company v. Public Utilities Commission* (U.S.D.C. N.D. Cal. No. C82-3074 MHP).

annul the decisions and restrain the Commission from further asserting jurisdiction over SP's intrastate rail transportation operations.

Executed at San Francisco, California this 14th day of January, 1983.

MALCOLM T. DUNGAN
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By ROBERT N. LOWRY
Attorneys for Petitioner
Southern Pacific
Transportation Company

VERIFICATION

I, D. M. Mohan, am Vice President—Maintenance, of Southern Pacific Transportation Company, Petitioner in the above-entitled matter. I have read the foregoing Petition for Writ of Review and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California, this 13th day of January, 1983.

D. M. MOHAN

D. M. Mohan

IN THE
SUPREME COURT OF THE
STATE OF CALIFORNIA

SOUTHERN PACIFIC TRANSPORTATION
COMPANY, a corporation; DENMAN K.
MCNEAR, and individual; and WILLIAM
S. WEBER, an individual,

Petitioners,

v.

No. S.F. 24573

PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA AND THE INDIVID-
UAL MEMBERS THEREOF,

Respondents.

PETITION FOR WRIT OF REVIEW
WITH
MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF

TO THE HONORABLE ROSE E. BIRD, CHIEF JUSTICE,
AND TO THE HONORABLE ASSOCIATE JUSTICES OF
THE SUPREME COURT OF THE STATE OF
CALIFORNIA:

Southern Pacific Transportation Company ("SP"), Den-
man K. McNear ("McNear") and William S. Weber ("We-
ber") respectfully request this Court to inquire into and deter-
mine the lawfulness of Decision No. 83-02-079, dated February
17, 1983, of the Public Utilities Commission of the State of
California ("Commission"), as modified by Decision No. 83-
05-037, dated May 4, 1983.¹

¹ Decision No. 83-02-079 is Appendix A hereto; Decision No. 83-05-037
is Appendix B hereto.

The foregoing decisions were issued in Case No. 82-08-01 following contempt proceedings instituted against SP and some of its officers by the Commission in Decision No. 83-02-038, dated February 11, 1983.²

SP, McNear and Weber seek review of Decision No. 83-02-079 because, by it, the Commission has purported to assert authority over California intrastate rail transportation which Congress has expressly taken away, and has unlawfully held SP, McNear and Weber in contempt of the Commission for attempting to exercise rights and privileges conferred under federal law. As more fully described below, the issue of the Commission's jurisdiction to regulate intrastate rail service is before this Court in No. SF 24525, but has not yet been determined by this Court in that or any other proceeding.

Jurisdiction of the Court

This petition is filed pursuant to the jurisdiction of the Court to review the decisions of the Commission under §§1756-1767 of the Public Utilities Code. On March 18, 1983, SP, McNear and Weber filed their application for rehearing of Decision No. 83-02-079.³ By Decision No. 83-05-037 of May 4, 1983, the Commission denied the application.

Grounds for Petition

SP, McNear and Weber seek review of Decision No. 83-02-079 of the Commission as modified by Decision No. 83-05-037 on the following grounds:

By ordering SP to continue operating passenger trains between Oxnard and Los Angeles until further order of the Commission, the Commission purported to exercise an authority which the Congress has expressly taken away by

² Decision No. 83-02-038 is Appendix C hereto.

³ SP's Application for Rehearing is Appendix D hereto. It adopts and incorporates by reference the jurisdictional arguments contained in "Special Appearance of Southern Pacific Transportation Company and Response to 'Notice of Motions for Orders of Clarification and Implementation.'" The Special Appearance is Appendix E hereto.

the enactment of the Staggers Act⁴ and which the Interstate Commerce Commission ("ICC") has expressly assumed by accepting SP's tariff which defines and governs SP's holding out to operate the trains ("the ICC Tariff"). The making of such order is in excess of the Commission's authority, contravenes the Supremacy Clause of the federal Constitution, and is in defiance of the ICC's exclusive jurisdiction over California intrastate rail transportation.

By adjudging SP, McNear and Weber in contempt for suspending the passenger trains pursuant to the ICC Tariff, the Commission has unlawfully interfered with petitioners' attempt to exercise federal rights and privileges.

Questions Presented

The Commission's Decision No. 83-02-079 as modified by its Decision No. 83-05-037 presents the following questions for review by this Court:

1. Does the Commission, on and after the assumption by the ICC of jurisdiction over California intrastate rail transportation pursuant to the Staggers Act, have jurisdiction and authority to require SP to continue performing intrastate rail passenger service which SP seeks to suspend in accordance with its lawfully filed ICC Tariff?
2. Can the Commission impose penalties against SP, McNear and Weber for attempting to fulfill obligations imposed by federal law?

Statement of the Case

The order of which review is sought arises out of Commission proceedings which resulted in orders directing SP to operate four week-day passenger trains between Oxnard and Los Angeles for the complainant, Department of Transportation ("Caltrans"). When SP suspended the trains in

⁴ The Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895 (the "Staggers Act"), was passed by Congress October 1, 1980, was approved October 14, 1980 and was made effective as of October 1, 1980.

accordance with a provision in its tariff lawfully on file with the ICC giving SP the right to suspend service for nonpayment of tariff charges, SP, McNear, and Weber were held in contempt of the Commission and fined. SP was ordered to continue operating the trains until further order of the Commission authorizing the suspension of such operations.

The original proceeding was instituted on May 18, 1978 by complaint filed by the County of Los Angeles and CalTrans seeking an order directing SP to establish commuter rail service between Oxnard and Los Angeles, subsidized by the County and Caltrans.⁵ While that proceeding was pending, Congress enacted the Staggers Rail Act of 1980.

The Commission did not become certified by the Interstate Commerce Commission ("ICC") to regulate California intrastate rail rates (including passenger fares) in accordance with federal standards, as required by Staggers. As a consequence, on May 11, 1982, the ICC assumed exclusive jurisdiction to regulate all intrastate rail transportation within California pursuant to 49 U.S.C. §11501(b)(4).⁶ As a result of that assumption, the Commission lost its authority under the police power of the State to require the performance of intrastate rail transportation by carriers subject to the ICC's jurisdiction, such as SP, 49 U.S.C. §10501(c)(1). Thus, on June 2, 1982, when the Commission ordered SP to begin building the commuter stations and parking lots and to file a tariff with the Commission, the subject transportation was under the exclusive regulatory jurisdiction of the ICC (Decision No. 82-06-045).

SP was and is challenging the Commission's order of June 2, 1982 in federal court. To the extent that SP was compelled to participate in Commission proceedings following the ICC's assumption of jurisdiction on May 11, 1982, SP strenuously protested the Commission's lack of subject matter jurisdiction.

⁵ *County of Los Angeles, Department of Transportation v. Southern Pacific Transportation Company*, Case No. 10575. The motion of County to withdraw from the case was granted on April 7, 1981. As a consequence, the entire responsibility for subsidizing the commuter train service fell to Caltrans.

⁶ Ex Parte No. 388, State Intrastate Rail Rate Authority—P.L. 96-448, 365 I.C.C. 700 (May 4, 1982), 47 Fed. Reg. 20220 (May 11, 1982).

The second proceeding arose from a complaint filed August 4, 1982, by Caltrans asking the Commission to institute contempt proceedings against SP for its alleged failure to construct stations and file with the Commission its tariff so that the commuter trains would begin operating on the date specified by Caltrans.⁷

Hearings were held on the contempt complaint on September 27 and 29, 1982, culminating in further orders against SP, directing SP to begin operating the commuter trains on the morning of October 18, 1982.⁸ SP complied under threat of contempt hearings scheduled for 10:00 A.M. on October 18, 1982.

Although the commuter service was instituted pursuant to invalid Commission orders, once instituted, it became transportation subject to the jurisdiction of the ICC. Under 49 U.S.C. §10762(a)(1), rates and charges for such service must be published in a tariff filed with the ICC.⁹

Accordingly, on November 2, 1982, SP filed with the ICC its tariff, with an effective date of December 2, 1982, naming charges payable by Caltrans as the agency which ordered the service. The ICC Tariff also set forth the terms and conditions under which SP will provide special transportation services and includes a provision permitting SP to suspend operation of the service in the event Caltrans did not pay SP in accordance with the tariff and as required by 49 U.S.C. §11905.

Special permission from the ICC required before the tariff could even be accepted for filing, subject to protest and possible suspension and investigation. The Special Permission Board of the ICC granted SP permission to file the tariff over the vigorous objection of Caltrans. Caltrans next filed a protest

⁷ *Department of Transportation v. Southern Pacific Transportation Company*, Case No. 82-08-01.

⁸ Decision No. 82-10-031, dated October 6, 1982 and Decision No. 82-10-041, dated October 18, 1982. Both decisions are before the Court in S.F. 24525.

⁹ § 10762(a)(1) provides: "A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates"

against the tariff with the ICC Board of Suspension, urging that it be rejected, or suspended and investigated. When the Board declined to suspend or investigate, Caltrans appealed to Division 1 of the ICC, but Division 1 allowed the tariff to take effect December 2, 1982. Caltrans then petitioned for reconsideration of the appellate division action, but Division 1 held that its earlier vote was not to reject or suspend or investigate the tariff.¹⁰

In its various protests and appeals before the ICC, Caltrans challenged the ICC's jurisdiction over the intrastate passenger service and also assailed the level of the charges and the rule permitting suspension of service for nonpayment. The ICC's refusal to reject or suspend the tariff is an express affirmation of its jurisdiction over the service and an implicit rejection of Caltrans' contentions that the tariff was unlawful.

By the end of January 1983, Caltrans owed SP more than \$2 million under the ICC Tariff. Although SP had provided and Caltrans had received the services described in the ICC Tariff since October 18, 1982, Caltrans steadfastly refused to pay these tariff charges. As permitted by the tariff and required by law, SP notified the public that train service would be temporarily suspended, commencing February 7, 1983, and continuing until Caltrans paid SP monies due under the tariff. Had SP continued to render transportation services for less than the tariff rate, it would have been in violation of 49 U.S.C. §10761 and would have been subject to civil and criminal penalties prescribed by §§11903(a) and 11905.¹¹

After notifying the public as described above, SP suspended the trains on February 7 and 8, 1983, pursuant to the ICC Tariff permitting such action for nonpayment of charges.

On February 7, 1983, the United States District Court for the Northern District of California issued a temporary restraining order directing that the trains operate at least until Friday, February 18, 1983, when the court would consider the request

¹⁰ Division 1's decision, served January 21, 1983, is Appendix F.

¹¹ § 11903(a) provides for a fine of up to \$20,000 and imprisonment for up to two years; § 11905 provides for a fine of up to \$2,000 per offense per day.

of the County of Ventura and others that a preliminary injunction be entered directing the continued operation of the trains.¹²

On February 11, 1983, the Commission, in Decision No. 83-02-038, directed SP to appear at a hearing to show cause why SP, McNear, or other officers of SP should not be held in contempt for violation of the order directing SP to operate the commuter service (Decision No. 82-10-041).

The Order to Show Cause was issued by the Commission on its own motion and was, notably, not at the instigation of Caltrans on whose behalf the service was being operated. In fact, Caltrans appeared at the contempt hearing on February 15, 1983, and advised the Commission that due to funding and equipment difficulties, the continued operation of the trains was problematic and might not be in the public interest.

SP entered a special appearance at the hearing and defended against the Order to Show Cause as being in excess of the Commission's jurisdiction. SP also introduced evidence establishing that the attempted suspension was in compliance with its ICC Tariff and that its officers had acted on the advice of counsel. Weber appeared and identified himself as being one of the SP officials who had effectuated the suspension.

On February 17, 1983, the Commission held SP, McNear, and Weber in contempt and fined them \$2,000 for each train not operated, for a total fine of \$16,000 (Decision No. 83-02-079). In the contempt order, the Commission took the position that SP was barred from raising the Commission's lack of jurisdiction because SP had not appealed the denial by this Court of a previous petition for writ of review in which those arguments allegedly were or could have been raised. The Commission pointedly warned SP that any further attempts by SP to suspend the trains without Commission approval would be met with additional contempt actions by the Commission.

On May 4, 1983, the Commission recomputed the amount of the fine payable, reduced it to \$1,000, and denied rehearing (Decision No. 83-05-037).

¹² *County of Ventura v. SP* (U.S.D.C. N.D. Cal. No. C83-0581 MPH). On February 22, 1983 at the hearing on the motion for preliminary injunction, the TRO was dissolved and the case was dismissed.

Related Proceedings

California Supreme Court. Prior to May 11, 1982 when the ICC assumed exclusive jurisdiction over California intrastate rail transportation, SP on two occasions sought a writ of review of Commission orders in Case No. 10575. These petitions were not directed to any order in Case No. 82-08-01 and did not raise, and could not have raised, the questions presented by this petition.

On October 3, 1980, in S.F. 24220, SP petitioned this Court for a writ to review Decision No. 91847 as modified by Decision No. 92230. The grounds of the petition were that (1) the Commission acted beyond its jurisdiction under State law in ordering SP to provide a passenger service which SP had not dedicated itself to provide, and (2) the Commission unlawfully failed to consider the availability of alternative bus service with the advantages of lower cost, greater fuel efficiency and flexibility of service.

On July 16, 1981, in S.F. 24316, SP sought review of Decision No. 92862 which denied the motions of SP and Greyhound to reconsider the need for the proposed service and to dismiss the proceeding in view of the withdrawal of the County of Los Angeles as a complainant and of Decision No. 92863 which ordered the commencement of commuter service. When that petition was filed, the order to begin operations had been stayed by Decision No. 93118 of May 11, 1981. Such stay remained in effect until June 2, 1982.

The petition in S.F. 24316 did not raise, and could not have raised, the issue of federal preemption because the ICC had not then assumed jurisdiction over California intrastate rail transportation, and the order to commence service had not become final.

By minute order of December 23, 1981, this Court denied without comment the two petitions for review in S.F. 24220 and S.F. 24316.¹³

¹³ 30 Cal.3d (Adv.) No. 2, Minutes, p. 3.

On October 13, 1983, in S.F. 24476, SP sought a writ of prohibition restraining the Commission from enforcing its orders to institute and operate intrastate passenger service.

Oxnard and Los Angeles (Decision Nos. 82-10-031 and 82-10-041) on the grounds that the orders were in excess of jurisdiction. The Court treated the petition as one for a writ of review and denied it on January 19, 1983, citing Public Utilities Code Section 1731, which makes the filing of an application for rehearing with the Commission a condition of this Court's jurisdiction to consider a petition for writ of review. Since no application for rehearing had preceded the petition in S.F. 24476, it was denied on procedural grounds.

On January 14, 1983, in S.F. 24525, SP again petitioned this Court to review Decision Nos. 82-10-031 and 82-10-041 following denial of its application for rehearing. The grounds of the petition are that (1) the Commission acted beyond its jurisdiction in violation of the Supremacy Clause of the U.S. Constitution by attempting to exercise an authority over intrastate rail transportation taken away in the Staggers Act, and (2) the Commission authorized Caltrans to enter onto and occupy SP's property without compensation in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution, the California Constitution, and the Eminent Domain Law of the State. This petition remains pending before the Court.

Federal Courts. Following the order of June 2, 1982, directing SP to build commuter stations and to file its tariff with the Commission, SP promptly raised the issue of congressional preemption in federal court in an action for injunctive relief filed June 15, 1982.¹⁴ This was the first opportunity SP had to raise this issue after the ICC had assumed jurisdiction over California intrastate rail service on May 11, 1982.

In the mistaken belief that this Court's denial of the previous petitions was res judicata of the issue of the Commission's jurisdiction, the District Court on August 9, 1982, denied the motion for preliminary injunction and granted summary judgment for the Commission. The issue of federal preemption is now on appeal to the Court of Appeals for the Ninth Circuit. Oral argument was heard on April 11, 1983.

¹⁴ *Southern Pacific Transportation Company v. Public Utilities Commission* (U.S.D.C. N.D. Cal. No. C82-3074 MHP).

WHEREFORE, SP requests the Court to issue its writ of review with respect to the Commission's Decision No. 83-02-079, as modified by its Decision No. 83-05-037, and upon such review to determine that, in ordering SP to continue to provide intrastate rail transportation service and in holding SP, McNear and Weber in contempt for exercising rights under federal law, the Commission has acted in excess of its authority contrary to the Constitution of the United States. The Court is further requested to annul the decision and restrain the Commission from further asserting jurisdiction over SP's intrastate rail transportation operations.

Executed at San Francisco, California this 2nd day of June, 1983.

WILLIAM R. DENTON
JOHN MACDONALD SMITH
CAROL A. HARRIS
840 Southern Pacific Building
One Market Plaza
San Francisco, CA 94105
Telephone: (415) 541-1779

By CAROL A. HARRIS
Carol A. Harris
Attorneys for Petitioners

VERIFICATION

I, D. K. McNear, am Chairman and Chief Executive Officer of Southern Pacific Transportation Company and am a petitioner in the above-entitled matter. I have read the foregoing Petition for Writ of Review and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California, this 1st day of June, 1983.

D. K. McNear

D. K. McNear

VERIFICATION

I, W. S. Weber, am Assistant to Vice President—Government Relations of Southern Pacific Transportation Company and am a petitioner in the above-entitled matter. This verification is made on behalf of Southern Pacific Transportation Company and also on behalf of myself, as an individual petitioner. I have read the foregoing Petition for Writ of Review and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California, this 1st day of June, 1983.

W. S. WEBER

W. S. Weber

ADDRESS ALL COMMUNICATIONS
TO THE COMMISSION
CALIFORNIA STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102
TELEPHONE (415) 557-0470

PUBLIC UTILITIES COMMISSION

STATE OF CALIFORNIA

FILE NO.

March 4, 1982

Chairman Reese H. Taylor, Jr.
Interstate Commerce Commission, Room 3219
Twelfth St. & Constitution Ave. N. W.
Washington, D.C. 20423

Dear Chairman Taylor:

RE: Ex Parte No. 388, State Intrastate Rail Rate Authority

As you may know, we are contesting the constitutionality of Section 214 of the Staggers Act in *State of Texas and Railroad Commission of Texas, et al. v. United States of America and Interstate Commerce*, Civil No. A-80-CA-487 (D.C. Tex.). Because that case is still pending, California has chosen not to comply with Section 214 and become certified. This lack of certification should not be interpreted as supporting the deregulation of intrastate freight rates. On the contrary, we want intrastate freight rates to continue to be regulated.

The issue to be resolved in the Texas suit is whether federal law or state law should control the regulation of intrastate freight rates. During the time this issue is pending before the Court, we anticipate that the ICC will not allow there to be any break in the regulation of intrastate freight carriers.

We believe that this letter complies with the request of the ICC in its decision served February 8, 1982 in Ex Parte No. 388.

Very truly yours,

JOSEPH E. BODOVITZ

Joseph E. Bodovitz
Executive Director

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PUBLIC UTILITIES COMMISSION

STATE OF CALIFORNIA

FILE NO.

March 10, 1982

Chairman Reese H. Taylor, Jr.
Interstate Commerce Commission, Room 3219
Twelfth Street & Constitution Ave., N. W.
Washington, D.C. 20423

Dear Chairman Taylor:

Re: Ex Parte No. 388, State Interstate
Rail Rate Authority

The California Public Utilities Commission (CPUC) in compliance with Ex Parte No. 388 recently notified the Interstate Commerce Commission (ICC) in a letter dated March 4, 1982 that the CPUC anticipated "that the ICC will not allow there to be any break in the regulation of intrastate freight carriers." The CPUC meant this statement to be a request that the ICC assume jurisdiction under the Staggers Act over the intrastate freight rates only pending the outcome of *State of Texas & Railroad Commission of Texas, et al. v. United States of America & Interstate Commerce*, Civil No. A-80-CA-487 (P.O. Tex.). If the ICC does not regard the CPUC March 4, 1982 letter as such a request, please regard this letter as such.

Sincerely,

JANICE B. KERR

Janice B. Kerr
General Counsel